CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n. District. *May* 1825.

CAULKER *vs.* BANKS.

EASTERN DISTRICT, MAY TERM, 1825.

CAULKER vs. *BANKS.*

Whether a cause can be sent before referrees, where either party has prayed for a jury, quere?

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It is not every error in the decision of questions arising on the trial

APPEAL from the parish court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court.

This case comes up on bills of exceptions, and a correct understanding of them, requires the pleadings to be particularly set forth.

The petition states that the plaintiff and defendant entered into co-partnership, for the purposes of trade, on condition that the former should purchase in Philadelphia and other places, goods, wares, and merchandise, which the latter should sell in New-Orleans. That in pursuance of the agreement, large quanti-

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ties of goods were bought by the plaintiff, and forwarded to the defendant, and were by him sold.

That this partnership has been dissolved, and the defendant repeatedly and amicably requested to render a just and true account of the sales of the merchandise, and pay over the balance due the petitioner, but which the defendant has failed to do.

That the defendant has, it is true, rendered to the petitioner, a pretended account of sales, but that the same is false and fraudulent, both as it respects the quantity of goods, and the price at which they were sold.

That the profit really made on the partnership property amounts to $48,089 89, to which the plaintiff is entitled to one half.

The petition concludes by praying the defendant may be decreed to render a true and faithful account of the sales of said goods, wares, and merchandise, and pay over the balance due to the petitioner; and if he fail to pay the same, that he may be condemned to pay the sum above mentioned, with interest and costs; and that the cause may be tried by a jury.

The defendant pleaded the general issue,

of a cause which will induce the supreme court to remand it.

Counsel can make affidavits on any matters relative to the proceedings which the client could.

If a cause be submitted to a jury, on the condition that they may hear testimony on their retirement, but that they shall reduce it to writing; if they fail to write it down, the cause will be remanded.

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and that so far from being indebted to the plaintiff, there would be found, on a settlement of accounts, a balance of $5,000 due by him. The answer concludes by a prayer, that he be condemned to pay the sum, with interest and costs.

This answer was filed on the 28th of January; and on the 20th of May, on the cause being called for trial, the defendant moved the court to refer the accounts to three referrees, to be appointed by the court, under the statute of 25th December, 1804, and 10th of April, 1805, it appearing they were long and intricate. The court overruled the motion on the ground that as *fraud* was alleged in the petition, and a jury prayed to try it, the judge could not exercise the discretion which he might do in an ordinary cause. To this opinion the defendant excepted, and its correctness presents the first question for our decision.

The statutes referred to in the bill of exceptions, contain the following provisions.

"That any suit pending at any time in the said court which may in the opinion of the judge require the examination of accounts, or any petition for liquidation of any inheritance or of insolvent debtors praying relief, *may be*

referred to such person, or persons, as the court may appoint, who shall, under its direction state such accounts, or report his, or their opinion thereon to the court." *Acts of the legislative council*, 1804, *p.* 6.

That in all cases which shall appear to the said court to require the investigation of long and intricate accounts *it shall be lawful* for said court to refer the statement to three proper persons to be chosen for that purpose by the court; who shall examine said accounts, and the vouchers and other testimony in support of them, and state such accounts in their report to the court, which referrees, &c., &c. *Acts of the legislative council*, 1805, *p.* 256.

This question, with every other which the cause presents, has been most elaborately discussed. Among other positions which were assumed in argument, it was contended; the authority to send a cause to referees could not be exercised in cases where either party prayed for a jury, because it would be depriving the citizen of the right to the latter mode of trial. Whether there be any thing in the constitution of this state, which prevents the legislature from directing a particular class of cases to be tried by the court with the assis-

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tance of referrees, is a point which will be examined when a case arises, where it will be necessary to do so, to settle the rights of the parties before us. As this case was not taken from the jury, all that we have to decide is, the legality of the opinion which refused to refer it.

The first statute declares, cases of the class now under examination, *may be* referred to referrees. The second provides *that it shall be lawful*, for the court to refer accounts to them. The first of these provisions it has been admitted, leaves it discretionary with the court to profit by their assistance, or not. The second however, it has been urged takes away that discretion, and makes it the duty of the court to refer them.

This construction of the statute has been supported, by arguments drawn from a change in the intention of the legislator, evinced by a change in the phraseology of laws passed within such a short interval of time; by public convenience; and by reference to various other statutes in which the words *it shall be lawful* are used as synonimous with "*it shall be the duty.*" &c.

The reasoning drawn from convenience ac-

corded so entirely with our own opinion, that full weight has been given to every other observation by which this construction of the statute has been supported. But even with this aid, the argument has failed to convince us, and the interpretation contended for cannot receive our assent.

It may be true, that in several of our statutes, expressions similar to those found in this, make it the duty of the court on the occurrence of the case contemplated by the law to at once act under it. But as these expressions *ex vi termini* do not make it obligatory, this necessity arises from the nature of the duty imposed, not from the language which confers the authority.—When the thing to be done is permitted only in the mode pointed out by the statute, which declares *it shall be lawful* for the court to do so, a refusal to carry the law into effect would be denying a remedy which the legislature had conferred; hence, the expressions must be understood as leaving no discretion. But when the same thing might have been accomplished in another way, antecedent to the passage of the act, or by distinct provisions of the same law; and an additional authority is conferred to attain the same end, by the terms *it shall be lawful;*

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we cannot consider these additional means as exclusive of all others, or as a taking away of those already possessed by the court. In this instance it is not denied, other provisions of the same statute gave the court the power, either by itself, or with a jury, to try the issue joined between the parties. The authority conferred to send it before referees, cannot be considered as taking away that power. It is a different, but not a contrary mode, cumulative with the other, but not inconsistent with it, and either may be resorted to. See the case of *Patterson* v. *Le Farge*, which on principle cannot be distinguished from this, *Vol.* 1, 194.

We conclude therefore on this point that there is not any thing in the act, which makes it compulsory on a judge to abridge his labors, or simplify the facts by referring them to other persons for their report: and that if he will take the trouble to decide on them without the aid which the legislature has thought proper to accord him, there is nothing illegal in his doing so, and that we cannot refuse deciding on facts which reach us through this channel.

We pass to the next bill of exceptions on which reliance has been placed in this court and it is in the following words "On the trial

of this cause, J. Kohn, a witness for the plaintiff, was asked, on his cross examination, if a book now presented to him, and marked D. S. & K. was the original book in which entries were made in the store of Mr. Banks at the several periods as therein stated, and whether any of the entries therein, were made in the hand writing of the witness. This question was objected to by the plaintiff's counsel, and overruled by the court, on the ground of its being an indirect way of forcing in evidence the books of the defendant.

On what grounds the right to offer this evidence was urged in the court below, the record furnishes us with no information. To understand those on which it has been sustained here, it is necessary to recur to the pleadings, and the testimony drawn from the witness, on his direct examination.

The petition charges the defendant with having rendered a false and fraudulent account, and requires him to give a correct one.

On his direct examination, the witness was interrogated in regard to the manner the defendant transacted the partnership affairs; and among other things how the books were kept. The witness stated that there were a good

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many cash sales made; but no cash book kept, that the private goods of defendant were mixed with those of the partnership, and when sold together on a credit, the notes were invariably taken in the name of the appellant. That in the account kept of the sales thus made it was not distinguished which belonged to the firm or the individual partner, and no account was kept in any book of the sales made for cash.

The defendant has contended this evidence goes to fix charges on him of a most serious kind, and had a tendency to make unfavorable impressions on the mind of the jury. That consequently it was within the latitude allowed on cross examination, to shew the incorrectness of the witness' statement, by producing a book, the inspection of which would have established the accounts to have been kept in a different manner from that stated by him.

It is difficult to meet this argument fairly, and give it a satisfactory answer. The defendant had most certainly the right to test the credibility of the witness in the mode which the question implies, and considering the matter in the light in which it was presented in the court below, we think the interrogatory should have been permitted to have been put to the wit-

ness. But other considerations mingle with the enquiry here. Supposing the court erred, it does not *necessarily* follow the cause should be sent back for a new trial. A presumption at least should be raised, that in consequence of the error, the decision on the merits was different from what it would otherwise have been. That presumption has not been raised here. As correctly observed by the court below, the testimony could not have made the book evidence; it was therefore only legal to shake the witness' credit. Now for the latter purpose it was rendered wholly unimportant by a subsequent agreement. This agreement was entered into after the cause had been six weeks under investigation before the jury, and by it the parties agreed to submit the case to eight jurors sworn; upon the testimony already taken and the documents on file; and further, that the jury might send for this witness, and examine him on *any point*. We cannot believe, after such an agreement, reliance was intended to be placed on the want of credit in the witness' veracity, or that the verdict of the jury was in the least affected by the refusal of the court in an early stage of the cause, to permit him to state whether entries in a book presented to him,

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were in his hand writing. 2 *Caines*, 129. 1 *John. case.* 259.

We now come to the last and most important of the exceptions presented, and that is, to the correctness of the decision of the judge *a quo*, in refusing a new trial. The principal grounds on which it was demanded, were, that all the evidence submitted had not been taken into consideration by the jury, and that the testimony which they had heard in their retirement had not been reduced to writing.

These reasons for a new trial shew how unusual and irregular a course this cause took in the court below. To understand them, it is necessary to state, that, after the investigation had continued for the period already mentioned, the parties came to the following agreement and affixed their signatures to it.

"We now agree to submit this cause to the eight jurors sworn on the testimony already taken, the books and accounts and all other written testimony on file. The jury, for further information *on any point*, may, if they please, send for Henry Hutton, Peter M'Alpine, and Joachim Kuhn, but no other witnesses, and they shall attend only if and when, the jury require it. It is agreed that Mr Caulker furnish

the jury the extract of the letters of Thomas Banks, marked A. and his remarks B. not as evidence, but for the sake of reference to the original letters and accounts to which he objects."

Two of the counsel for the defendant prove, that independent of the stipulations herein contained, it was also agreed on by the parties, and the jury were so informed, that all evidence received by them in their retirement, was to be taken down in writing.

An objection was made to the reading of the affidavits of the counsel, on the ground that they were excluded by an act of the legislature, which positively prohibits them *giving testimony* in any cause.

The contemporaneous exposition of this statute was, that by its provisions, counsel were placed under the same disability as the parties in the suit. The practice in this court, and others, has been to permit them to swear to matters connected with the proceedings previous to trial, and subsequent to it, to get a continuance or to lay the grounds for a new trial. This interpretation of the law has now for the first time been seriously attacked, but after giving much attention to the argument,

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we are satisfied of the soundness of the construction, originally given to the statute. The words *giving testimony in a suit*, cannot, in fairness, be extended beyond the meaning attached to the general provision, that a party shall not *testify in his own cause*. A knowledge of the facts indispensable to enable the court to conduct the trial legally, is frequently confined to the attorneys. It cannot be presumed it was the intention of the legislature to exclude the only means through which these facts could be known, and without which the proceedings could not be carried on according to law.

In addition to their evidence it is proved by a witness to whose competency no objection has been made, and whose testimony stands uncontradicted, that the counsel for both parties told the jury on retiring; that the depositions which they might take from the witnesses in their room should be taken in writing by questions and answers; that he gave evidence there, and that it was not reduced to writing.

We consider it therefore, as established beyond doubt, that it made a part of the condition on which the jury was to hear evidence out of the presence of the court, that it should be reduced to writing. Every presumption

belonging to the case fortifies this proof. By the agreement the parties did not renounce the appeal. It cannot therefore be believed, they did not intend to secure the means of giving effect to a right which they reserved.

This state of things offers a difficulty, which after turning the matter in every way that it has presented itself to our minds, cannot be got over. The laws of this state have secured to suitors in our courts, the right to have their case examined here on the merits. That right can only be forfeited by neglect, or illegality in the mode of bringing the case up; it cannot be lost by accident over which the party had no controul, and in relation to which no misconduct can be attributed to him. Such we take to be the general rule, and one, of the utility and correctness of which, a reasonable doubt cannot exist. We have already acted on it in the case of *Porter* vs. *Dugat*. There the parties agreed the judge might make out the statement after judgment. He lost his notes, and the appellant moved this court to remand the cause for a new trial, in order that the facts might be legally and regularly brought before it. The application was resisted, on the ground that it was not the fault of the ap-

pellee, the cause did not come regularly up, that the consent he gave was for the convenience of his adversary, and every presumption was in favor of the verdict. The court said it was not the fault of the plaintiff, the district judge mislaid his notes, he ought not to suffer from an accident over which he had no controul. *Vol.* 9, 92.

That case was stronger than this, for there perhaps the appellant was not free from fault; as after a verdict against him, it was his interest alone, and of course his duty, to have the case regularly brought up. Here when the agreement was entered into, the verdict was not rendered; it was of course uncertain; and being so, it was equally important to both, to secure the means of guarding against the errors into which the jury might fall.

These means have failed. Without either fault or misconduct of the appellant, he is deprived of a right, which the law has secured him, of having his case examined here. Under such circumstances this court cannot pronounce definitively on his cause. Every precedent we have heretofore established; every principle which it is important to preserve, in relation to the practice in our courts, forbid it.

We *might be* doing the defendant a dreadful injustice in doing so. We can only delay the plaintiff by adopting the other course.

It is due to the argument at bar, to notice the principal reasons offered against the conclusion just expressed.

First it was contended, the jury were not compelled to take down the evidence, and consequently, it must be presumed the parties intended running the risk of their not doing so.

Admitting the jury were not compelled to take down the evidence, we are of opinion that if they were informed when the cause was surrendered to them, they were to reduce to writing any further evidence they might hear, it was their duty to state whether they intended to comply with this injunction or not. And that if the appellant misled by their silence, suffered the examination of the testimony to be withdrawn from the presence of the court and confided to the jury in the confidence they would follow the instructions received, his case is as strong a one for relief, as if it had been their duty to record the evidence. For he loses his right to appeal without any fault on his part.

Next it was urged, the evidence even if

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taken down, could not have been a legal statement of facts, without the subsequent consent of the parties; and this being known at the time, the appellant must be presumed to have left the cause to the jury, subject to this contingency.

We are of opinion that if the jury had taken down this testimony, the consent of the parties to their doing so, would have made it such a statement as this court might have acted on. We are unable to distinguish this from evidence taken under commission, or facts agreed on, before, or at the trial.

Lastly, and most seriously, it was urged, that as soon as the plaintiff discovered the jury had failed to take down the evidence, he offered to receive the depositions of the witnesses, as to what they might have testified in the jury room; and those of the jurors, in relation to every thing which had been proved to them after they left the presence of the court.

This offer was not made until one month and five days after the verdict had been rendered, and it cannot be concealed, that such a mode of getting the evidence was liable to strong objections. For after the space of time just mentioned, how could any one be certain to give

from memory the very same evidence which was delivered to the jury? Under such circumstances, and believing, as we do, that the failure of the jury to take down the evidence, gave the appellant the legal right to have a new trial; we are unable to say this right was forfeited, by refusing an offer, made as a substitute for that relief, which the law would afford.

Strong appeals to our feelings have been made on behalf of the plaintiff. The hardship which he sustains by being compelled to leave his family and home to pursue the defendant here the ruinous consequences to him, from the delay of a second investigation of accounts, which on the first trial, took the unprecedented time of six weeks before the jury could understand them; and the injustice of suffering the defendant to profit by the embarrassment created by his gross negligence, and want of good faith, have been placed before us in the most striking light. These appeals have not been without their influence, for they derive too much support from all the facts which appear on record; and we regret that the opinion we entertain of the law of the case, prevents us from putting an end to it. Nothing gives the

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court more satisfaction than to be enabled to make its judgments meet the justice, as well as the law of each particulaar case. But it must, ere this have appeared clear to every one who has attended to the course of decisions in this tribunal, that on all those occasions, where the doing of equity would have violated a general and important rule, we have uniformly refused *to sacrifice the rule, to the case.* This is our situation here. The appellant invokes his right to be heard before this tribunal, and says he has been deprived of it without fault on his part. We cannot turn a deaf ear to this complaint, unless we violate a principle, which it is of the first importance to suitors in our courts to maintain: and nothing will reconcile the plaintiff so soon to this judgment which now compels him to go again before the parish court, than the reflection; how valuable the rule we obey would be to him, had the jury found a verdict against him, and by failing to take down the evidence, deprived him of the means of getting his cause re-examined here on the merits.

Various other questions have been made which the opinion just expressed renders unnecessary to examine; and it is therefore ordered, adjudged and decreed, that the judg-

ment of the parish court be avoided and reversed, and that the case be remanded for a new trial, the appellee paying costs of this appeal.

Mazureau, Preston and Carleton, for the plaintiff, *Grymes, Morse and Maybin*, for the defendant.

MARIGNY vs. *JOHNSTON'S SYNDICS.*

It is no objection to the reading of a notarial act, that it is written in French.

In a suit against syndics to be placed on the tableau, there is no necessity of an amicable demand.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The plaintiff seeks to recover from the defendants the price of a lot which he sold, and by mesne conveyances was transferred to the insolvent, who bound himself to pay the price to the plaintiff.

The syndics pleaded the general issue, there was judgment against them and they appealed.

We notice a bill of exceptions to the opinion of the parish judge overruling the objection of the defendants' counsel to the reading of the notarial act of sale, introduced by the plaintiff on the ground of its being written in the French language. The objection was overruled; the

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question was examined in *Tilghman* vs. *Dias* 12 *Martin*. 649.

The defendants further urge that the plaintiff has illegally proceeded by suit, to the great expense and injury of the other creditors seeking a judgment against the syndics, whilst his legal right was only to concur and be paid contradictorily with the other creditors: at the time of filing the tableau of distribution.

The syndics, it appears, denied the plaintiff's right to the money recovered, this compelled him to sue; he prayed that the syndics might be decreed to pay him his claim and for general relief. The judgment directs him to be paid according to his rank and privilege, by the defendants in their capacity of syndics.

The rank and privilege, is to be fixed contradictorily with all the parties concerned, on making the tableau,

The plaintiff has prayed the judgment to be amended in the part which condemns him to costs.

He was condemned to pay costs because no amicable demand was proven. His counsel urges he was not bound to administer proof of this demand, because it was not specifically denied.

We are of opinion that as the object of the suit could only be that the plaintiff should be paid according to his rank and privilege, *i. e.* that he should be put on the tableau; the suit was not one of those on which the act of 1813 requires a demand: suits for the *payment* of any sum of money. *Martin's Digest* 2, 196.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and proceeding to give such a judgment, as in our opinion ought to have been given below; it is ordered, adjudged and decreed, that the plaintiff have judgment for $1,288, to be paid him according to his rank and privilege, with costs in both courts.

Dumoulin for the plaintiff, *Nixon* for the defendants.

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If a commission merchant send an account current, in which a balance appears due from him, which he after-

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is a suit instituted, to recover a balance of an account. Payment is refused by

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wards pays, he will not be allowed to recover it back on the ground that he sold his correspondent's cotton for a bill of exchange on N. York, which has since returned protested, if he did not before disclose this circumstance: especily if the correspondent consigned the cotton for a third party, to whom he has paid the proceeds.

the defendants, and a recovery opposed, on the ground of improper conduct by the plaintiffs in relation to one of the items in their account current which constitutes the balance claimed. Judgment was given in the court below in favor of the plaintiffs, and the defendants appealed.

The matter in dispute between the parties, is the price of 29 bales of cotton, which were sold by the appellees as factors or agents, for and on account of the appellants. The sale as shown by the evidence of the case, was made on credit, and a bill taken on New-York, at sixty days sight. The bill was drawn by one Smith, the purchaser, on a firm of which he was a partner, for $2085 70 cents, in favor of the plaintiffs, who discounted it and gave credit to the defendants in account, for the nett proceeds: it was protested for non-payment in consequence of the failure of the payees. The drawer it appears also became insolvent; and in the adjustment of his estate, the plaintiffs obtained $1000, on account of said bill, having appeared in the *concurso* as creditors of the insolvent in their own right, and leaving a loss of $1397 10 cents, including charges to be borne by one or other of the parties.

The principal grounds of opposition to a recovery relied on by the counsel for the defendants, are: 1st. That factors or agents are not authorised by the usages of commerce in the city of New-Orleans to sell for their employers on credit, and cannot legally do so unless special anthority be given to that effect. 2d. Admitting that the plaintiffs are justified by the usages of trade to sell the property of the constituents on credit; yet, in the present instance they have been guilty of misconduct, such as ought, in justice to place the loss on them, because they are chargeable with gross negligence in not giving information to the defendants in a reasonable time, of the manner in which they had disposed of the cotton now in dispute; by which negligence they have suffered in paying over the amount of the sum to Brashears, the real owner, 3d. By assuming the character of creditors on the bill of exchange and transacting with the insolvents, they have made the affair their own.

In relation to the first ground of defence, considered in the light of a general principle, usage, or custom of trade; we are of opinion that factors may sell on ordinary credit, by sales made in good faith, and to individuals of

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good standing at the time of sale; and that they would not be responsible for losses occasioned by a subsequent failure of such purchasers; if they act with sufficient diligence in giving notice to their employers of the manner in which they may have executed their agency. Whether this authority, allowed by custom, to factors to sell on credit, would, under any circumstance, authorise them to take bills of exchange on distant places as evidence of the debt to their principals; and thereby subject the latter to losses which may arise, from negligence in presenting them; charges of damages on protests, &c. is a question worthy of consideration, and one which we think must be answered in the negative; unless full information be given to constituents of the manner in which their business has been transacted, and that in reasonable time for them to direct the mode in which they may choose to have bills thus drawn, negociated on their account. The right therefore legally assumed by factors and commission merchants to sell on credit, does not authorise them to sell for bills in such a manner as to subject the owners of the property to any loss which may be occasioned by mismanagement, in their collection, or to da-

mages on protest, unless the persons for whose use they may have been received by their agents have full notice of the proceeding. The conclusion to which we have arrived on this point of the cause, would exonerate the defendants from all charges made on the bill in controversy on account of protest, &c., and reduce it to a simple obligation to pay the balance after deducting the sum obtained from the estate of the drawer, with interest from the judicial demand: because they had not notice of the manner in which payment for their property was secured. Nothing on the record shows that they received any information from the plaintiffs on the subject of this bill, until after its protest for non-payment.

The second ground of defence assumed by the appellants is based on the negligence of the appellees, in not giving notice that the sale which they had effected was on credit, but, on the contrary, by an exhibition of their account, it appears that the principals were credited with the price as a cash sale on the 3d of June, 1822, which led them into error, in paying over or crediting the amount of the price to the real owner from whom they had received the cotton as agents.

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It is true, as contended for by the counsel, for the appellees, that this latter fact was not disclosed to them when the cotton was consigned. The case must be considered as if the property was really that of the consignors; and the circumstances of its being owned by another person, and of the intermediate agents having credited him with the price; can only be viewed as proof of the necessity, obligation, and consequent duty imposed on factors to give speedy, certain, and explicit advice to their employers of the manner in which they have conducted the business of the latter.

It is, most clearly, the duty of every person who undertakes to manage the affairs of another, to give due notice to his constituent, of the situation in which they are placed by his agency; more especially it is the duty of those who propose themselves to the whole community, as general agents or factors, to exhibit, in addition to adequate capacity, a ceaseless care of things entrusted to their management, both as to the manner in which they may be conducted, and in advising owners, of the real dispositions, made of their property. This we believe may be laid down as a general principle, resulting from legal doctrine on agency;

but its application, in administering justice, is not without difficulty.

What effect negligence ought to have on the interest of agents in each individual case, must be decided in a great degree on its own peculiar circumstances. In that now under consideration, the plaintiffs sold the property of the defendants, on credit; they took a bill on New-York for the price, in their own favor; they obtained money on that bill; credited the defendants for the nett proceeds in their account with them, and did not give explicit information to the latter of these proceedings.

The consequence of this negligence was that the appellants credited the real owner with the price, which to them, if not lost forever, is at least put out of their power and immediate control. Let us admit then that factors and commission merchants in New-Orleans may sell the property of their principals on a reasonable credit; that they may sell it for bills of exchange such as are usual in the commercial transactions of the place. Still we are of opinion, thas when this is done, the principal ought to receive due information of the manner of sale, and that an account of sales rendered without stating that it was on credit, ought, in

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the ordinary course of business, to be considered as a sale for cash. It is highly important that the owner of property should know whether his agent has sold it for prompt payment or on credit; it is equally important that he should know the nature of the security by which the price may be secured, whether by bill or note. He has a right to direct the manner in which such instruments as belonging to him shall be negotiated, whether with, or without recourse on failure of payment by the original promissors. In the present case the defendants were, by the conduct of the plaintiffs precluded from the exercise of any of these rights; for they had no notice of the manner in which their property had been sold, or of the nature of the security of its price.

They have received the net proceeds according to the account current made evidence in the case. The action is in the nature of one to recover money paid through mistake or on an unjust cause. We are of opinion that the conduct of the plaintiffs has been such, in the management of this affair, as not to authorise a judgment in their favor. Having arrived at this conclusion on an examination of the appellants' two first points, it is unnecessa-

ry to discuss the third and last. *See* 3 *Campbell's Reports, p.* 291, & *Paley on agency, ps.* 27, 5, 37, & 45.

In opposition to the doctrine contained in the case cited from Campbell, the counsel for the appellees has referred us to a case lately decided in one of the courts of the the state of New-York: it is one, according to the newspaper report, in which a factor had sold property of his principal on credit, to the amount of $187. The sale was made to persons in good credit at the time, and a note taken for the amount: the debtors failed before it became due; and previous thereto a settlement of accounts had taken place between the principal and agent, and the latter gave his note for the balance of account payable to the former at a time subsequent to that on which the note given by the purchasers of the property would be due. The principal had negociated the factor's note, which the latter paid at maturity, and brought his action to recover the amount lost by the bankruptcy of the purchasers. It seems from the statement of the case that the purchasers names had not been disclosed in the amount of sales, &c. It does not appear whether the fact of the property having been

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sold on credit, was made known to the owner, but from the circumstance of the factor's note being made payable at a period subsequent to that on which the purchaser's note became due, it is presumed it was understood between the parties that the agent was not in possession of the funds of his principal arising from the sales of the property. In other words he knew that it had been sold on credit. In the present case it does not appear that the defendants knew or were informed that the property had been sold on credit. They were kept in total ignorance of the manner of the sale until both drawers and payees of the bill became bankrupts. The affair had the appearance of one finally settled in the account current, as if the sale had been made for cash.

We are of opinion that the plaintiffs by their conduct made the bill their own, and must as such bear the loss occasioned by it. Whatever weight may be allowed to the news-paper case, it is not so similar to that under consideration, as to be a guide in our judgment. We believe the principles recognised in the case cited from Campbell to be sound, and applicable to the present.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and that judgment be rendered for the defendants and appellants, with costs in both courts.

Eustis & *Strawbridge* for the plaintiffs, *M'Caleb* for the defendants.

KENNER & AL. vs. *DUNCANS'S EXECUTORS.*

APPEAL from the court of Probates.

PORTER, J. delivered the opinion of the court. The petition states, that certain property belonging to the succession of A. L. Duncan, has been sold under an order of the court of probates, at a credit of one, two, and three years. That the petitioners are the first mortgage creditors of the estate of said Duncan, for a much larger amount than the price for which said property was sold. That they have demanded from the defendants the notes received by them from the purchasers; with which demand they have complied, in relation to two of the notes, but refuse to give up that received for the third and last instalment.

If judgment be rendered in a suit where *three* are parties, *two* of them cannot have the judgment reversed in another action.

Executors cannot safely pay a mortgage creditor until his claims be settled contradictorily with the other creditors.

If the representative of an estate fail to settle it, the regular course is to compel them to file a tableau of distribution. And if they fail

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to comply with an order to that effect, they will render themselves liable in their private capacity.

The defendants plead, that they have no objection whatever, to the prayer of the petition; that they have never refused to deliver up said note or notes, and they know no reason why the plaintiffs should not get them, That the judge of the court of probates has made a difficulty, and refused to allow the defendants to hand them over. Under these circumstances they submit the case to the court.

The statement of facts agreed on, is as follows:—

1. The property described in the petition was sold in the manner therein described, and set forth.

2. The petitioners are the first mortgagees of the property therein described.

3. All demands on the part of the state of Louisiana, as arising from the bond subscribed by A. L. Duncan, with I. L. M'Coy, and John Nicholson, have been paid and satisfied.

The judge of probates has assigned for reasons why he could not comply with what appears to be the wishes of both parties in this suit, that on a rule taken by the plaintiffs on the defendants to deliver up these notes, notice was given to the attorney general, and that on hearing the parties, an order was given, the

plaintiffs might take out the notes, provided they gave security to meet the responsibility of the estate of said Duncan, to the state of Louisiana. That instead of complying with this order, the plaintiffs have instituted this action, and on a statement of facts made by two of the parties, seek to have the decree reversed.

We think there cannot be a doubt, the judge is right. Either the attorney general as representing the state of Louisiana was, or was not, properly made a party to this proceeding. If the former, it is quite clear, the judgment rendered cannot be reversed, as it respects him, or those he represented, without making him a party either to the appeal, or the action in nullity. If the latter, his right to interfere should have been contested in *limine litis*.— The parties acknowledged his competency by suffering him to appear in the cause.

But these facts appear no where on the record, but in the opinion of the judge: we are therefore, under the necessity of examining, and deciding the case, on the statement made by the parties.

The cause has been submitted without argument. In the petition it is stated, that by the laws of the state, and the decisions of this

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tribunal, the mortgage held by the petitioners has been cancelled and annulled, and transferred to the proceeds of the sale, therefore they have a right to receive whatever that sale produced.

We are able to admit these premises much more easily, than the conclusion the plaintiffs draw from them.

The laws of this state it is very clear, do direct that a sale of all the property of a succession as well that which is mortgaged, as that what is not, should be sold; and that the mortgagee should have the same privilege on the proceeds, that he would have had on the thing itself. But in order to ascertain what that privilege is, not merely as it affects the estate, but in relation to all other persons who may have liens on it; these laws have provided the pretentions of the mortgagee creditor shall be examined contradictorily with the other creditors. And it is not, until after that examination takes place, and the rank and dignity of his privilege is established, that the person who administers the succession can legally, or with safety make payment to him.

The following articles of our code indicate the duties of those who have the administra-

tion of estates intrusted to them, and shew the manner in which creditors whether chirograph or mortgage, must assert their claims.

"At the expiration of the delay granted by law for the payment of the debts of the estate, the curators of vacant estates, shall not proceed to the payment of the debts of the estate, until they shall have previously obtained the authorisation of the parish judge by whom they have been appointed; that authorisation shall be necessary, even in case there were money enough in hand to discharge all claims on the estate, but should there not be sufficient property to satisfy all demands, it shall be *their duty* to cause the parish judge to regulate the classes of the privileges, and mortgages, and thus to establish the rank in which the creditors shall receive their payment." *Civ. Code*, 178, 137.

From this provision it is plain, no payment can be legally made, until the authorization of the judge is obtained. It is equally plain that mortgage or privilege creditors form no exception to this rule; they are expressly mentioned, and provision made for settling any conflict which their different pretentions may give rise to.

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The mode in which this settlement should be made is not however so clear. Did the article just cited stand alone, there would not perhaps be much difficulty in interpreting it. For as the judge is directed to settle the rank and order of the privileges and mortgages, it would not be a strained inference to say, that he could not do this unless he examined them all, and to enable him to do so, all the creditors should be cited before him, in order that each should, present and support their respective claims.

But the article just quoted is followed by another, which provides that, "public notice shall be given by the curator in both the English and French languages, of his having obtained an authorisation to make payment; or of the sentence of the judge which settles the rank in which the creditors must be paid, either by papers posted up in the usual places, or through the news-papers; to the end that any person interested to oppose the payment in the manner ordered, may take the necessary steps for that purpose." *Civ. Code*, 178, 138.

And the next article declares "if any opposition is made to the payment as ordered, the parish judge by whom the authorisation of

making payments, and the classing of privileges has been made, shall determine in a summary way on the merits of the opposition, saving the right of the parties to bring an appeal." &c. 178, 139.

It follows from these provisions the law does not contemplate, the creditors should be present, and heard on the first classification of their claims. For if they did appear, and their rights were then decided on, they could not come in again, and make opposition to that, which had already been adjudged on contradictorily with those to whom they were opposed. The first judgment would form *res judicata*, and the question would not be open for examination.

The regulating of the classes, of the privileges and mortgages spoken of in the 137th article, we understand to be made by the judge, on a statement of the representative of the estate, shewing its effects and its debts active and passive, which settlement does not become final, or authorise the curator, or other administrator, to pay until the creditors who are notified in the manner pointed out in the 138th article, shall either fail to make opposition, or that the opposition they make, shall be overruled.

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The course of proceeding which is evidently that pointed out by law, is perhaps not the very best that could be devised to compel a speedy settlement of the estate. But it is far as some have supposed, from leaving the creditor without remedy, for if the representative neglects or refuses to file a tableau of the estate, and obtain the order of the judge to make payment, he can be compelled to do so on the demand of the interested, or in default thereof, render himself responsible in his personal capacity.

The mode of relief which the plaintiffs have resorted to in this case, does not appear sanctioned by any of the provisions of our law, and it is in direct variance with its policy, which is, as has been more than once observed by this court, to prevent advantages being gained by one creditor over another, and to secure a legal distribution of the estate by examining the claims of all, or at least giving all an opportunity of being heard.

The petitioners seek by a suit carried on between them, and the representatives of the estate, to have payment made to them, before payment has been ordered, and notice of it given to the world. They do more, they seek

to have their claim recognised as one of the highest privileges, without any classification being made as the law directs. This appears to us quite irregular. If the plaintiffs wish to quicken the executors in the discharge of their duty, they must begin by calling on them to file a *tableau* of the estate, and after this done and an order of payment is made, due and legal notice must be given of their having obtained this order, to the end that all interested, may if they think proper, oppose it.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court, dismissing this suit, be affirmed with costs.

Duncan for the plaintiffs, *Hennen* for the defendants,

M'INTOSH vs. *FORSTAL & AL.*

APPEAL from the court of the first district.

Decision of a jury prevails on question of fact, unless clearly erroneous.

PORTER, J. delivered the opinion of the court. This action is brought to recover damages, in consequence of a flat boat being run against and stove by the steamboat United States. The loss is alleged in the petition to have proceed-

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ed from the negligence of the persons having the command of the steamboat.

The general issue is pleaded. The case was tried by the judge of the inferior court without the aid of a jury. He gave judgment for the defendants. The plaintiff appealed.

The evidence on which the cause was decided, comes up in the record. We have examined it with the utmost attention, and confessing with the judge below, that we have had considerable difficulty in coming to a conclusion, still we are unable to say it authorises us to give a decision different from that which he has pronounced.

The principal difficulty in our minds, has been this: it is admitted on all hands the flat boat was discovered several minutes before the accident happened, and there cannot be a doubt, that the steamboat, by turning out into the current, as soon as she came in sight, might have avoided the meeting. If then, the care necessary to be exercised on occasions of this kind, be tested by the steam vessel not having taken *so wide a birth*, as to render the contact impossible, there can be no doubt the defendants are responsible. We have hesitated whether this was not the true rule in relation

to craft of this kind, where the one has such command of the stream, and the other is almost completely under its guidance. But on reflection, we do not think such extraordinary diligence was called for on the part of the captain of the steam-boat. Relying on the command of the river, which the agent that impelled his vessel, gave him, he may have fairly considered that he could avoid the flats (for there were more than one in company) without leaving the shore such a distance, as to delay his own voyage up. Whether he took the necessary precaution in due time, is the real question in the cause. The presumption is against him, since the boat struck. The evidence we have from the persons on board the flats, fortifies this presumption. *That* we get from the pilot and others on board the steam-boat destroys it, and states the accident to have arisen from the conduct of the persons on board the flat pulling out from shore, so as to render it impossible for the steam-boat to pass between the two flats; which she could have easily done, had they not rowed, or had ceased rowing, when hailed from the steam-boat. With such contradiction in the testimony, and the opinion of the court below on a

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question of fact, against the party who held the affirmative, and was bound to make out his case; we think the judgment of the inferior court should be affirmed with costs.

Hennen and Strawbridge, for the plaintiff, *Eustis* for the defendants.

BRYAN vs. *COX*.

Appeal from the court of the first district.

Surety on an appeal bond, is answerable, though execution has not issued or demand made of the principal.

Whether the penalty of a bond can be demanded before the defendant is *en demeure*, quere?

Porter, J. delivered the opinion of the court. The question presented in this case is, whether the surety on an appeal bond, be liable where no execution has been issued, or demand made of the principal.

The negative has been supported on the following grounds.

The bond is a penal one. The penalty is forfeited only when the obligor is in delay, *en demeure*. The debtor is not in delay until judicial demand. The condition of this bond was, that the defendant only became responsible on his principal failing to perform the judgment rendered against him, or satisfying the execution which might issue thereon. *Poth. on ob.* 144, 350. *Civ. Code*, 284, 130.

This obligation being a judicial one, the defendant has no right to claim discussion. He is subject to the same responsibility, as the principal.

Now, in a suit against the principal, it appeas to us, that if the defence were performance of the judgment, proof of that defence would be required from the defendant. The plaintiff could not be called on to prove a negative. The possession of the bond would be as strong proof of his right to bring action on it, as that of a note or bill of exchange would be, to call on the maker for payment.

The authorities referred to, as to the necessity of putting the defendant *en demeure* by a judicial demand, have no application to this case. This is not an action to exact the penalty; if it were, *perhaps* the defendant might insist, that until he was put *in delay*, it could not be exacted from him. This petition merely requires the defendant to comply with the agreement, to enforce which the penalty was annexed.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Maybin for the plaintiff, *Strawbridge* for the defendant.

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It is not a good defence against the claim of a sheriff for fees of office, that he has not resided within the state during the time the services were rendered.

Where one charges the other with a culpable breach of duty, he is bound to prove it, tho' it involve a negative.

If slaves be committed as felons and runaways, an acquittal of them as felons, does not authorise a discharge of them as runaways.

It is not a good defence the slaves were not kept in close custody.

If a sheriff fail to advertise runaway slaves, he cannot recover his legal fees, but he may recover the value of his services, if the

APPEAL from the court of the fourth district.

PORTER, J. delivered the opinion of the court. The petitioner claims $432 87 cents, which he avers the defendant owes him for clothing, sustenance, and medical aid, furnished two of his negroes from the 29th day of May, 1820, until the 25th of March, 1822, being the time they were confined in the jail of Point Coupée, of which parish the plaintiff avers he is sheriff; and also moneys paid for taking up the said slaves, and for advertising them according to law.

The defendant pleads,

1. The general issue.

2. That the plaintiff did not reside within the state, during the time for which he claims remuneration for keeping the slaves.

That he was not during the same period sheriff of Point Coupée.

4. That if he ever was sheriff, he forfeited the office in consequence of not furnishing bond with security, on the first Monday of May, 1820, nor at any other time during that year; and by not causing the said bond to be recorded according to law.

5. By a similar neglect in the year 1821.

6. That the plaintiff held the negroes mentioned in the petition, illegally and contrary to law, to the damage of the defendant, for which he prays judgment.

7. That the slaves were taken up on a criminal accusation and the defendant is not responsible unless they were convicted.

8. That the slaves were not detained in due custody as the law directs.

9. That the matters and things at issue in this action have already been adjudicated on and therefore cannot be examined again.

And 10th, and finally, that if any thing be due the plaintiff, he owes the defendant a larger sum, as already stated.

To these objections the following have been added in this court.

1. The plaintiff did not furnish the security required by law to entitle him to maintain this action.

2. That he did not advertise the negroes according to law.

3. Sheriffs are entitled to recover no other fees for keeping and maintaining runaway slaves than such as are duly fixed by the police jury, and their ordinances for that pur-

owner knew of their confinement and refused to take them out.

Cause will not be remanded for an error on the trial, which could not have affected the merits.

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pose must be promulgated. 2 *Martin Dig* 514, 516, 3 *ibid* 302, 2 *Martin Rep*, 455.

4. No amicable demand was made, and the court below erred in giving judgment, *with costs.*

The 1st, 2d, and 3d grounds of defence presented in the answer cannot be sustained. The evidence shews how little ground there is for the general issue. Whether the plaintiff resided in the state or not, during the whole period the slaves were in confinement, is a question with which the defendant has nothing to do. The commission produced and read in evidence on the trial, proves there was no foundation for the objection, that the plaintiff was not sheriff of Point Coupée.

As little do we consider the defendant supported in his 4th and 5th pleas. The general rule of evidence is that where one charges another with a culpable omission or breach of duty, the person who makes the charge is bound to prove it, though it may involve a negative; it being one of the first principles of justice not to presume a person has acted illegally, until the contrary is proved. The defendant charges here a breach of duty, and he has offered no evidence to sustain the charge,

though such evidence was within his power by calling on the persons who are directed by law to take these bonds, and with whom they are to be deposited. *Philip on Ev.* (*ed.* 1821) 150. 9 *Martin*, 49.

VI. There is no evidence the plaintiff held the negroes contrary to law. They were delivered to him as runaways; and it was his duty to receive them.

VII. The slaves were not committed for felony alone, but as felons and runaways. The want of evidence to establish they were the former, did not necessarily acquit them of being the latter, and the sheriff was bound to keep them in custody as runaways.

VIII. Whether the slaves were kept in *close* custody or not, cannot affect the plaintiff's right of action, though it may, according to circumstances, diminish the amount he ought to recover. The sheriff let them out on his own responsibility.

IX. There is not the slightest foundation for this objection. The right to *retain money* in the plaintiff's hands to satisfy this demand, was the only point decided by the court. This does not furnish the plea of *res judicata*, as to whether any thing, or how much be due the plaintiff.

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X. There is no evidence in the record the plaintiff is indebted to the defendant.

The first point made in this court, in relation to the want ot security, has been already disposed of. The second, that he did not advertise the negroes, requires more particular notice. The fact of his not having done so, is clearly established. But it is in proof, the defendant, who visited the parish where the slaves were confined, had personal knowledge of their being taken up as runaways and thrown into prison; and that he declared he had no claim to them. Under these facts the defendant called on the judge, to charge the jury, that the plaintiff could not recover. The court in compliance with this request, did charge the jury that the plaintiff could not recover as sheriff; but added, they might find for him on a *quantum meruit*. The opinion of the judge *a quo* is complained of by both parties. It appears to us, however correct. The plaintiff's right to the compensation given by law *for his services as a public officer*, is necessarily dependant on *his having performed those services according to law*. If he varies from the direction prescribed by the statute, he cannot claim under it. But although not entitled to the fees

given by it, he is still entitled to remuneration if he has benefitted the defendant by clothing and feeding his negroes; and what the amount of that remuneration should be, the judge put fairly to the jury, by telling them they should find for the plaintiff what his services were worth.

This opinion renders it unnecessary to enter into the question, whether a sheriff can recover any other fees but those which are fixed by the police jury.

In addition to all these objections, the record presents another on the part of the defendant. It appears that one of the negroes was let out of jail for some time, and placed on the plantation of a planter in the parish. The reason assigned by the plaintiff for his having made this disposition of the slave was, that he was sick. On the trial the plaintiff was permitted to interrogate the person at whose house he was, as to the conversation that passed between witness and the deputy sheriff, at the time the latter delivered the slave. To the opinion of the court permitting him to do so, the defendant excepted. The whole of this witnesses evidence comes up on the record, and the only conversation he relates, is, that having under-

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stood the reason for sending the negro to his house, was that he was sick, he told the deputy sheriff he would feed him and cloth him as his own negroes, and set him to work when able. What the witnesses motives were for taking the slave, could not in any respect have varied the legal rights of plaintiff & defendant, and it being very clear it could not have influenced the minds of the jury, it is unnecessary to remand the cause for a new trial on this ground.

Several bills of exceptions were taken during the trial, by the plaintiff, which it is unnecessary to notice particularly, They present nothing which can affect our judgment on the merits, and the appellee has not asked the cause to be remanded.

The suit does not appear to have been brought without a demand. The pleadings and evidence shew these costs had been demanded, and contested by defendant, before the institution of this action.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Watts and *Lobdell* for the plaintiff, *Workman* for the defendant.

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CROCKER vs. NULEY & AL.

CROCKER vs. NULEY & AL.

APEAL from the court of the third district.

PORTER, J. delivered the opinion of the court.

The plaintiff claims from the defendants a lot of ground, or in in case he cannot recover it, a sum of money which he states it was mortgaged to assure the payment of.

The words I *do sell*, in an instrument, amounts to a sale.

Consent of vendee may be given after the sale, and proved by evidence *aliunde*.

It is unnecessary to examine the validity of the pretention last stated, for the defendants are third possessors, and the plaintiff shows no judgment against the principal debtor.

The title under which the defendants claim, is as follows.

"Memorandum of things, *I do sell* to Mr. Folket, the lot adjoining that which he now owns, for $450" &c. After enumerating other objects amounting in the whole to $773 50 cents, the instrument concludes with the following clause "of all which I shall authorise a formal sale for the abovementioned sum of seven hundred and seventy three dollars fifty cents, one half of which shall be paid in December, 1811, and the other half in the same month of December, 1812, he, the purchaser, mortgaging the two lots until final payment.

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This writing bears date the 12th September, 1811, and is signed by the plaintiff; it has not the signature of the vendee.

There can be no doubt this was a sale *sous seing privé* of the premises now sued for. There is price, thing, and consent, the vendor states, *he sells*, and promises to pass a title by authentic act.

It has been objected this instrument is nothing but a pollicitation, as it wants the consent, and signature of the vendee. This consent may be shown by evidence *aliunde*, and the present case abounds in proof, the purchaser accepted the sale. He had it recorded, he entered into possession, and his heirs paid the price. It is contended this payment was made to a person not duly authorised to receive it; admitting the fact, it is still not less evidence of the assent of the purchaser to the sale. *Vol.* 11, 217.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Christy for the plaintiff, *Preston* for the defendants.

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RITCHIE vs. WILSON.

Damages for an injury cannot be claimed in reconvention, one year after its infliction.

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APPEAL from the court of the fourth district.

PORTER, J. delivered the opinion of the court. The defendant and appellant moves to remand this case for a new trial.

The action is instituted on a promissory note, given to the plaintiff for his wages, as overseer on the plantation of the defendant in the year 1822.

The answer contains the general issue, and a plea, that the defendant was not bound to pay the note, because the plaintiff while acting in the capacity of overseer, did in violation of his duty, and by improper and cruel treatment to a negro girl, the property of defendant, cause her to drown herself: whereby he has sustained loss to the amount of one thousand dollars.

To this answer an interrogatory was annexed, calling on the plaintiff to state on oath, whether the note was not given for his wages as overseer. The judge refused to direct it to be answered.

There is no allegation, the defendant was ignorant of this fact when he gave his note. As it occurred before the settlement of accounts, and execution of the instrument, there is a

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strong presumption, he knew it then; and if he did, it raises a strong presumption against the justice of the defence, that he should have given his note for $628, to the plaintiff for his wages as overseer, when at the same time the plaintiff owed him $1000.

The judgment of the court below was correct. Answering the interrogatory, could not have been of any use to the defendant, for the claim set up was barred by prescription. The wrong complained of had been committed more than one year before filing the demand in reconvention, *Par.* 7, *tit.* 9, *law* 22. *Doliole* vs. *Morgan*, *Vol.* 2, 26, *Inst.* 4, 4, 1.

But *as it is possible*, the defendant did not acquire a knowledge of the injury until within twelve months preceding his putting in this plea, although he has not averred it, the judge decided legally, in reserving to him his right to enforce it in another action.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Nicholls for the plaintiff, *White* for the defendant.

MILLER vs. *HENNEN*.

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If a note be made payable at the house of A. B. a demand at his dwelling house: or office, is good.

APPEAL from the parish court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. The defendant is sued as endorser of a promissory note, and in addition to the usual allegations of regular protest and due notice, liability is charged on the ground, that shortly after the execution of the note, the defendant in order to secure himself against his responsibility as endorser, obtained from the maker a transfer or sale of a tract of land, to be void, in case the latter saved him harmless.

The general issue, and a plea that the plaintiff was not the owner of the note sued on, are the defence presented by the answer.

The evidence shows clearly there is no ground whatever for the latter objection. The first presents more difficulty.

The note is drawn in favor of a certain Joseph Orillon, with interest at ten per cent., and is made payable at the maker's "elected domicil, at the house of Alfred Hennen, in N. Orleans."

The evidence showed a demand at the *office* of A. Hennen, which was in Royal-street, and that his dwelling *house*, was in another part of the city.

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The judge charged the jury, the demand was bad; but that the defendant was responsible in consequence of having taken security to save him from the effects of his endorsement. The verdict was in conformity with the charge. The defendant excepted to the latter, and has appealed from the judgement which affirmed the former.

The case presents three points for decision. First, whether the demand of payment was good.

Second. Whether due notice was given to the defendant. And, lastly, whether the drawer having given the appellant security to save him harmless from the effects of his endorsement, does not render him liable, although the note has not been regularly protested.

We think the demand was legally made. The note was payable at the house of the defendant, without designating whether it was his dwelling house, or the house where he kept his office. Under such circumstances we believe a demand at either good. The expression is indefinite, and the holder had certainly more reason to presume it was the house where Mr. Hennen generally was, and his business was transacted, than the private residence appropriated to the use of his family.

The defendant was regularly notified of the failure of the maker to take up the note. The notary swears that the day after it was protested, he left written notice at the office of the appellant.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Carleton for the plaintiff, *Hennen* for the defendant.

WHITEHURST vs. *HICKEY & AL.*

APPEAL from the court of the third district.

The absence of the reasons on which a judgment is grounded, is only a relative nullity.

A parish judge's certificate that a sheriff's bond has been executed, with the concurrence of the justices, is evidence that the sureties were approved by them.

The sureties are bound by it, although it be not recorded.

MATHEWS, J. delivered the opinion of the court. This is a suit brought against the curator of the estate of the late F. Amelung, who was sheriff of the parish of East Baton-Rouge, and against the sureties of the latter as sheriff aforesaid.

The petitioner claims remuneration for the loss and damage occasioned by the negligence and misconduct of the sheriff in the execution of judicial process, wherein the interest of the former was concerned. Judgment was ren-

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dered in the court below against the curator and in favor of the sureties, from which latter part of said judgment the plaintiff appealed.

The case has been held longer than usual under advisement by the court, in consequence of believing that it involved a very important question in relation to the jurisdiction of the district and probate courts of the state. The circumstance which led to this belief, is the appearance of a bill of exceptions on the part of the curator to the judgment rendered after the verdict of a jury to which the case had been submitted, on the ground of incompetence in the court.

This is in truth an exception to a final judgment which (as has been repeatedly decided,) cannot regularly be taken. In examining the record more minutely, we discover that the curator is no party to this appeal, either as appellant or appellee, and therefore no notice can be taken of his interest in the cause. It is to be considered only in relation to the sureties who are the appellees. In their answer to the petition, after pleading the general issue, they further allege that the sheriff's bond relied on by the plaintiff is illegal and void.

The case comes regularly before this court

on several bills of exceptions taken to the opinions of the judge *a quo* given in the course of the trial below. 1st. That by which he permitted the record of the suit carried on to judgment and issuing of execution, wherein the sheriff is charged with negligence and misconduct, to be given in evidence to the jury. 2d, To that by which he rejected the copy of a bond, proven to have been subscribed by the defendants, as sureties for the sheriff. 3d, To the opinion whereby he refused parol evidence to prove that the parish judge did assemble the justices as required by law to approve the security offered by said sheriff.

As to the first of these exceptions we are of opinion that the judge did not err, in admitting the record in evidence. The ground on which its admissibility was opposed, is alleged nullity in the judgment on account of no reasons being adduced in its support. Admitting that such nullity exists, it is only relative, and cannot be taken advantage of by the present defendants.

The opinion of the judge, as represented in the second bill of exceptions, we believe to be erroneous.

The truth and correctness of the copy of the

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bond offered in evidence, the real existence of the original at a former period, and its loss without fault of the plaintiff or by a fortuitous event, were amply proven on the trial of the cause in the court below, as shewn by the record; and the judge seems, not have rejected the evidence on account of any defect of proof in relation to the copy, but under an impression that the original itself was void and invalid, in consequence of defects in its execution. In testing this opinion, we are therefore compelled to enter into a discussion of the law which requires sheriffs to give bonds, and points out the manner in which they ought to be executed, The act of 1813, requires every sheriff in the state to give two bonds, one for the faithful discharge of his ministerial functions in the execution of judicial process, the other for collection of taxes. Both are ordered to be recorded in the offices of the clerks of the parish courts. 1 *Mart. Dig*, 696.

The bond now under consideration is alleged to have no binding force on the persons who have subscribed as sureties, as being defective in its execution, and void because not recorded, &c. The act above cited directs how sheriff's

bonds are to be executed, and the security offered approved. *Id.* 698, *art.* 3.

The parish judge is bound to convene a court (as it is termed) to consist of himself and a majority of the justices of the peace of the parish, who are required to judge of the sufficiency of the sureties offered and to approve or reject, as in their opinion propriety and the general interest may dictate. This court is not by the law compelled to reduce to writing, or to make out any process verbal, of their proceedings. The justices of the peace appear to be called in aid of the parish judge, to assist in judging of the sufficiency or insufficiency of the security to be offered by the sheriff; but are not required to sign the bond if accepted by the court. A bond shown to have been rejected, would not be binding on the subscribers: the want of the justices' names to theinstrument, is however, no evidence that the sureties have been adjudged insufficient and the bond rejected. A certificate of the parish judge, showing that bonds thus taken, have been executed with the concurrence of the justices of the peace, ought to be good evidence of approval of the sureties, and consequent validity of their obligations. The copy, offered

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in evidence in the present case, purporting the original was signed, sealed and delivered, in the presence of the parish judge and justices of the peace, who approved the security given by the sheriff is sufficient, having the signature of the judge.

We are therefore of opinion that it is good and valid according to the strictest forms of law. It now only remains to consider whether this validity is affected by the want of recording, in relation to the obligors. All the solemnities required in the execution and recording of these bonds are instituted solely for the benefit of the obligees (viz.) the public. A failure to comply with them may lessen public security, but certainly ought not to be so construed, as to exonerate sureties from obligations voluntarily contracted. It has been already decided by this court that promissors must remain bound in the manner which they may have thought fit to bind themselves, if the contract be not illegal.

In relation to the last bill of exceptions; we are inclined to think that oral testimony might have been properly received in corroboration of the fact declared by the parish judge in executing the bond, that the justices of the peaec present, approved that which was done.

But if the solemn declaration of the judge, in the instrument itself, be sufficient to establish its legal execution, additional testimony would be useless.

According to this view of the case the judgment of the district court must be reversed, and as the cause was tried before a jury, and legal testimony rejected, it appears to this court to be most consistent with its uniform practice to send it back for a new trial.

It is therefore ordered, adjudged and decred, that the judgment of the district court, so far as it relates to the appellees, be avoided, reversed and annulled, and that the cause be remanded to the said court, to be tried *de novo* between the parties to this appeal with instruction to admit in evidence the copy of the bond, &c.; and it is further ordered, that said appellees pay the costs of appeal.

Watts and Lobdel for the plaintiff, *Duncan* for the defendants.

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MILLAUDON vs. ARNOUS & AL.

MILLAUDON vs. ARNOUS & AL.

An agreement by the endorser of a note, to receive in payment, pickets at a fixed price, on a distant day after protest and notice, liberates the endorser.

APPEAL from the court of the fourth district.

MARTIN, J. delivered the opinion of the court. The defendants, sued as endorsers of a promissory note, pleaded the general issue, and that the plaintiff neglected to protest the note, and to give them notice of its not being paid, and did make arrangements and agreements with the maker, for the payment of it, whereby they were discharged. He had judgment and they appealed.

The record shows that the protest was read in evidence, and the notary deposed he gave notice to the defendants by a letter, which he put into the post-office.

Bouton, a clerk of the plaintiff deposed, that the plaintiff, having heard the defendant Pedron was at Vignaud's, in this city, sent the witness there, who was told by Vignaud that Pedron was out, but if the witness came about the note, he could tell him he heard Pedron say he would call and pay the plaintiff. This was in the course of 1823.

A letter from the plaintiff to the defendants, shows that he wrote to them, that with the view of facilitating the payment of the note to the

maker, he had promised to purchase pickets from him, provided, they were delivered in March following; that he had waited in vain, and had declined purchasing pickets from other persons. He now demanded payment from the defendants.

Vignaud deposed the plaintiff told him he had settled with Blake (the maker) for the note, that Blake was to send pickets in payment, that witness, calling a second time to ascertain whether the note was really paid, was informed Blake had settled it, and was to send pickets.

It is clear that the maker of the note acquired from the plaintiff the right of paying it in pickets on a deferred day. Although the plaintiff cautiously promised to *purchase* pickets, the object of this agreement to purchase was to *facilitate* to the maker the payment of the note and thus the plaintiff forewent the right of demanding money in payment of the note, till the deferred day, on which the pickets were to be delivered.

The facility thus yielded to the maker was an obstruction to the right of the payee, the plaintiff's endorser. For the plaintiff could not have transferred, after this agreement, the

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absolute right of the note to his assignee; no, not even to the defendants, if they had tendered him the amount of the note, in order to prosecute the maker, for the note must have passed to the assignee or the defendants, *cum onere*. For the plaintiff had, when he made this agreement, the complete ownership of the note, and every bargain made with him, insured to the maker the proposed advantage in the payment of the note, not only against the plaintiff, but also against any person, who by the assignment or delivery of the note, with a blank endorsement, might succeed to his rights.

There is no obligation of *active* diligence, in the holder of a note, to sue the maker or any prior endorser, and he may forbear to sue, as long as he pleases; but *he must not agree to give time*, so as to preclude himself from suing him, and suspend his remedy against him to the prejudice of the endorser. *Chitty*, 371.

The holder of the note, who intends resorting against his endorser, must retain the faculty, on receiving his payment from the latter, to transfer him all his rights, absolutely unimpaired, against the maker.

By doing an act which impairs this faculty the recourse against the endorser is forfeited,

and no circumstance can restore it without the endorser's concurrence.

Here, till the first of March following, by the agreement of which the plaintiff's letter contains the evidence, the right of sueing the maker had been abandoned by the plaintiff, with the hope pickets would be provided according to the agreement; the plaintiff during that time could not call on his endorsers for payment, for if they could be obliged to pay *him*, it would follow they could oblige the maker to pay *them*; which would be inconsistent with the agreement, that he should have the facility of paying in pickets, on the first of March.

The plaintiff's letter implicitly recognises the obligation he had put himself under, to wait with the maker till the first of March. For he makes the neglect of the maker to comply with his promise, to deliver pickets on that day, the ground of his right to call on the defendants.

But the plaintiff, by entering into an obligation to give time to the maker, rendered him less active to pay, than he probably would have been, if he had continued liable to an immediate suit, and the plaintiff's right on the defendants, affected by the indulgence he gran-

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ted to the maker, cannot be restored or revived by the neglect of the latter.

The plaintiff has relied on several cases, which we have attentively examined. That from 3 *Campbell* is the case of an *accommodation* note, which is there said to create an exception to the general rule. *Exceptio probat regulam.* That from 16 *Johnson* does not support him, the principle of that case being that *passive* indulgence does not discharge, but *active* does. Yet the plaintiff was *actively* indulgent. The case in 18 *Johnson* settles nothing; it is an *it seems* case, not very strong. The case in *Bosanquet and Puller* establishes that *receiving* security does not discharge. If the holder be not bound to sue, if he may wait, surely there is no injury done, if he take security, if he strengthens his right. The endorser, that may pay him, may have the benefit of this. The case in 10 *East* is the case of a *bond*, which in England, is not a negotiable instrument.

The case in *Gilmer*, a Virginia reporter, goes the whole length of the principle contended for in the plaintiff's case, but we have not been able to see the whole of it. The reports of that gentleman are not known to be in the

state, and we have only what we suppose to be *the marginal note of it*, in a digested index.

The case is a *solitary* and an *anomalous* one. We are unable to judge of the weight it is entitled to; particular regulations in Virginia very likely support it, but we cannot take it as affording us a legitimate rule of conduct.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendants, with costs in both courts.

Dumoulin for the plaintiff, *White* for the defendants.

JOHNSON vs. *BROWN.*

A curator is *functus officio*, at the end of the year; and then the court of probates has no longer any jurisdiction over him.

APPEAL from the court of the third district.

MATHEWS, J. delivered the opinion of the court. This suit was originally commenced in the court of probates for the parish of West Feliciana, in which judgment being rendered for the defendant the plaintiff appealed to the district court, and having there met with no better success, he appealed to this court. The judg-

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ment pronounced by the court of probates is on the merits of the case. That of the district court is confined to an exception or plea to the jurisdiction of the court in which the action began.

The petition after stating the cause of action prays that Brown may be cited to defend, as curator of the estate of one Bates, alleging at the same time that the period allowed by law to curators to settle accounts, had elapsed, viz. more than a year and a day from the appointment of the defendant. He is charged with mismanagement of the affairs of said estate, and the petitioner prays judgment against him for the amount of his claim, and also to have certain property sold to satisfy said judgment on which he pretends to have a privilege.

The defendant pleaded a settlement of his accounts as curator, the expiration of all power and agency as such, and that if he had mismanaged the estate he was only personally liable to an action, and that in the courts of ordinary jurisdiction. This exception was sustained by the district court, and the suit ordered to be dismissed. This judgment we believe to be correct. A curator is according to law *functus officio* after the expiration of a year.

Civ. Code, 180. He must then render an account of what he has done relative to an estate placed under his management; he must show what he has done in relation thereto; but cannot be compelled to do more under an authority which has ceased. If during the year, any agency has been commenced, which from occurrences could not be completed within the time limited by law for the duration of the functions of a curator, there would be much reason in favor of such a construction as would extend his power to the completion of business thus begun. Or when a suit had been brought against one as curator, and before, in due course of proceeding, it could be terminated the office expired by legal limitation; there would be some force in an application on the part of the plaintiff to be allowed to proceed to final judgment. But when, as in the present case, no step has been taken during the year, we are of opinion that the suit against the defendant in his capacity as curator cannot be maintained, and that the court of probates had not jurisdiction.

It would therefore be proper to affirm the judgment of the district court with costs; but

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the judge *a quo* has adduced no reason in his judgment as required by the constitution.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be avoided, reversed and annulled; and proceeding here to give such judgment as ought there to have been rendered. It is further ordered, adjudged and decreed, that the plaintiff's suit be dismissed from the inferior courts at his costs, and that the defendant and appellee pay the costs of the appeal to the supreme court.

Watts and Lobdell for the plaintiff, *Woodroof* for the defendant.

DE ARMAS vs. *MORGAN.*

Property specially mortgaged, cannot be sold at the suit of a third party, unless it bring more than the amount for which it is mortgaged.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff states he was the last and highest bidder for the sum of twelve hundred dollars, of a lot of ground, on which there existed a previous special mortgage for $1250, at a sale made by the defendant, on a writ of *fieri facias*, under the 17th section of the act of assembly,

entititled an act to amend the several acts, &c., approved the 28th of January, 1817. That he expressed his readiness to comply with the conditions of the sale, viz. to be responsible to the first mortgagee for the said twelve hundred dollars, and required the defendant to put him in possession, and give him a title to the premises, &c., which he refused to do.

There was judgment for the former, and the latter appealed.

The statement of facts admits those stated in the petition.

The act provides that whenever any special mortgage exists on the property offered for sale on a writ of *fieri facias*, in favor of any other person than the plaintiff, in the *fieri facias*, it shall be sold subject to such special mortgage, to be paid by the purchaser, and the sheriff shall only receive from the latter, the surplus for which the said property shall have been sold, over and above the amount of such special mortgage, and shall apply the same to satisfy the *fieri facias*.

The defendant's counsel urges the judgment ought to be affirmed, because the sheriff cannot sell property especially mortgaged, to a third party, unless something be bidden, be-

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yond the amount it is mortgaged for, and he refers us to *Landreaux* vs. *Hazzelton*, *vol.* 1, 600.

The plaintiff's counsel insists that there was a sale for the property seized was to be sold for what it could fetch. That a sheriff's sale cannot be avoided, on account of the inadequacy of the price, and he refers us to *De Ende* vs. *Moore*, *vol.* 2, 336.

The case relied on by the plaintiff's counsel establishes nothing, but the principle that the purchaser of property, at a probate sale acquires it free from incumbrance.

But it is of the essence of every sale, that there should be *a price*, received or to be received by the vendor; now, in the present case whether we consider the plaintiff in the *fieri facias*, or the sheriff as the vendor, there was *no price* received or to be received by either. The mortgaged creditor cannot be considered as the vendor, nor the sheriff as his agent, for the sale was made without his participation, consent, or even knowledge; if the law interfered, with his mortgage it could only be after securing his payment, and the present sale compels him to be satisfied, if it has any effect with a part of his claim.

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We think the district court acted correctly in deciding that there was no sale. In the case cited by the defendant's counsel, we held that a sale by the sheriff, of property specially mortgaged, when there is no surplus, nothing after paying the mortgage, would be *useless* to the plaintiff, and oppressive to the defendant; one, like the present, in which the price is less than the amount of the special mortgage, would be destructive of the right of the mortgagee; either would have the effect of showing the melancholy insufficiency of the law.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

De Armas for the plaintiff, *Hennen* for the defendant.

MARIGNY vs. *REMY*.

APPEAL from the court of the first district.

One may have an action, on a stipulation in his favor, in a deed to which he was not a party.

MARTIN, J. delivered the opinion of the court. The plaintiff states the defendant having purchased from the plaintiff's intermediat vendee, two lots and a half of ground, engaged in

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the deed of sale, to pay the price to the plaintiff, in lieu of his, the defendant's vendor, and afterwards sold the premises to Reneau. That neither the capital nor interest being paid, the plaintiff obtained judgment against Reneau, on which the premises were sold, and there remains due to the plaintiff, on said judgment, $415 93, which he claims from the defendant, with damages and costs.

The defendant pleaded the general issue, ad had a verdict and judgment. The plaintiff appealed.

The allegations of the petition appear proved by notarial acts, and the record of the suit against Reneau.

It appears that the judge *a quo* charged the jury in favor of the defendant, stating the plaintiff had no cause of action; as the defendant in the bill of sale, he received from the plaintiff's immediate vendor, did not bind himself *to* the plaintiff, and consequently, there was no privity of contract between the parties to the suit. The plaintiff's counsel excepted to this part of the judge's charge.

We are unable to see any difference in the facts of this case, and that of the *Mayor & al. Bailey*, 5 *Martin*, 321, in which we held that

one may have a direct action, on a stipulation in his favor, in a deed to which he was not a party. See also, *Duchamp & al.* vs. *Nicholson*, decided in July last, 672. 2 *Variæ Resol.* 700, *n.* 18. 1 *Pothier, Obligations*, 45, *n.* 58, 60. *id.* 54, *n.* 71, 72. *ff.* 45, 1, 38, *sec.* 20, 22, 7 *Hulot* [illegible], *Paillette, Code Civil* 7, *art.* 1121 and 1165. 10 *Pandectes Francaises*, 160 161. 6 *Toullier*, 164, *n.* 448, 449, and our own *Civil Code*, 262, *art.* 21.

The defendant's liability was not dissolved by the plaintiff recovering part of his claim from the former vendee.

We consider the district judge erred.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, the verdict set aside, and the case remanded with directions to the judge to proceed thereon, as if there had been no trial and not to charge the jury that, the plaintiff had no cause of action, because the deed of sale to the defendant containing no stipulation by which he bound himself *to* the plaintiff, the latter cannot have a direct action against the defendant, for want of privity, and it is ordered

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that the defendant and appellee pay costs in this court.

Dumoulin for the plaintiff, *Cannon* for the defendant.

LOUISIANA STATE INSURANCE COMPANY vs. *LOUISIANA STATE BANK.*

APPEAL from the court of the first district.

A bank is not relieved from the obligation of due diligence, in the case of a note received to be collected, by the removal of the maker's domicil out of the city.

* MATHEWS, J. delivered the opinion of the court. This is an action commenced by the Insurance Company against the Bank, in which damages are claimed from the latter as a remuneration for a loss occasioned to the former, by negligence and misfeasance of the officers of the bank, in the collection of certain notes which were placed in their hands by the insurance company, and which they undertook to collect. Judgment was rendered for the plaintiffs in the court below, from which the defendants appealed.

This case is similar in principle to that of *Montillet* vs. *U. S. Bank*, and *Crawford* vs. *State bank*, *vol.* 1, 214, 368, 708.

* Judge Porter took no part in this opinion, being a stockholder of the bank.

The correctness of those decisions was admitted in argument by the counsel for the appellants, who contends that there is one fact in the present case, which distinguishes it from those cited, and ought by its operation to release his clients from all responsibility, which might otherwise have arisen from negligence and mismanagement in the undertaking. This is the change of domicil of the maker of the notes fromN. Orleans before they became due. This suit is a sequel of that brought by the same *plaintiffs* vs. *Shamburg*, decided as shewn by the report in *vol.* 2, 511. In that case they failed to recover from Shamburg, the endorser of the notes in question, on account of the negligence of the agents of the bank in not making a demand of payment from the maker, in the manner required by law. It is contended in favor of the bank, that its officers are justifiable towards the plaintiffs in not having made this demand, in consequence of the removal of the maker of the notes from the city before they fell due. In support of this justification, it is alleged that the bank never undertakes to collect money on notes or bills, when the collection requires operations out of the city of New-Orleans, and that the implied contract

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and consequent obligation to collect ceased, on the removal of the maker of the notes, especially as this fact was known to the owners. In answer to these arguments, it is said by the counsel for the appellees, that the bank could have released themselves from this obligation, to collect, under the implied contract, only by returning the notes to the owners, after the fact of the maker's removal became known to them. Further, that they were led into error by the protest made by the notary who acted for the bank, because that instrument declared that a legal demand was made, and notice had been regularly given.

That the officers of the bank knew of the change of domicil by the maker of the notes before they became due, the evidence of the case abundantly shews. The knowledge of this fact is not so clearly brought home to the appellees; and even if it were, it ought not to change the situation of the parties, so as to release the defendants from their obligation to take all legal steps to collect the notes which they had undertaken. Their duties as agents, could have ceased in no other way, than by a return of the notes to the owners, or an explicit declaration that they would no longer act for them.

The erroneous conduct of the notary, in making a mistaken or false protest, certainly had a tendency to injure the plaintiffs: by it, it seemed that every thing had been regularly and legally done, which was necessary to charge the endorsers. They were thus lulled into security, and of course took no means to do that which they supposed had already been well done by their agents. Admitting this to be true; it is contended by the defendants that they ought not to be made responsible for the misconduct of the notary: being a public officer, he ought to answer directly for his conduct, that a protest could only be made by a notary, and when the bank placed the notes into his hands, its officers had fully and faithfully executed their trust.

In the case of a foreign bill of exchange, the dishonor of which can only be evidenced by protest, this argument would be entitled to great weight. But inland bills and promissory notes do not necessarily require protests by notaries: a demand of payment, refusal and notice to drawers and endorsers may be proven by any competent witness. In the present case we deem it proper to consider the notary as the agent of the bank, because they did by

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him, that which they might have done themselves.

The appellees claim interest on the amount of the notes from the date of the demand of payment and protest, now no demand was made. The present action sounds solely in damages for negligence and misfeasance in the officers of the bank; it is perhaps true that a fair criterion to ascertain the amount of damages, is the loss of the plaintiffs, occasioned by the misconduct of the defendants which is alleged, to be the sums, specified in the notes with legal interest from the day, on which they ought, regularly, to have been protested. If it had been so adjudged in the court below, we would perhaps not have disturbed the judgment. The contest may, as the cause now stands on an appeal, and being a suit for damages, be considered as among those little things which the law does not regard; *de minimis non cural lex.*

However fair and legal the judgment may be it is a hard case on the defendants.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Duncan for the plaintiffs, *Grymes* for the defendants.

SAULET vs. *DREUX'S SYNDICS.*

A judgment, reversing that by which a syndic was appointed, does not avoid acts done by him in the meanwhile.

The law has not fixed the number of days during which the sale of an insolvent's goods is to be advertised.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff seeks to be relieved from the payment of two notes, which he gave to the defendants, for the purchase of a slave of the insolvent, purchased at sale made by the defendants, on account of the illegality of the sale. The general issue was pleaded; there was judgment for the defendants and the plaintiff appealed.

The facts of the case are as follows.

Wiltz & Ferrier, having applied for the homologation of the proceedings of the meeting of the insolvent's creditors, at which they alleged they were duly appointed syndics, J. Dreux, an hypothecary creditor, opposed the homologation, alleging that Wiltz and he were legally appointed syndics, and not Wiltz and Ferrier. He succeeded in his opposition, and the court declared Wiltz and him the legal syndics, on the 31st of May, 1823.

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On their petition, the court ordered a sale of the property, to take place on the 9th of July following. Ferrier appealed, but gave security for the costs only.

On the 9th of July, Bouthemy's heirs obtained an injunction for staying the sale, but it was dissolved on the 12th, and on the petition of Wiltz & Dreux, the sale was ordered to take place on the 26th.

Bouthemy's heirs appealed from the judgment setting the injunction aside.

The sale took place on the 26th, when the plaintiff purchased the slave.

The heirs of Bouthemy failed in their appeal, and Ferrier succeeded in his appeal, the supreme court declaring Wiltz and him the legal syndics.

On these facts the plaintiff's counsel urges:

1. That J. Dreux never was a syndic, the decree of the inferior court, who declared him such, having been reversed.

2. That Ferrier's appeal suspended the execution of the decree of the inferior court.

3. That the first order of sale was void, being given before the decree, declaring the appointment of the syndics, was signed.

4. That the second order did not authorise

the sale, as it ordered it in so short time, that thirty days notice could not be given.

5. The injunction of Bouthemy's heirs suspended the sale.

I. The judgment of this court, reversing that by which J. Dreux was declared syndic, cannot have any retrospective effect, so as to vitiate acts done by him in the mean while.

II. Ferriet having given security for costs only, his appeal was not suspensive, but devolutive.

III. As no sale took place under the first order, it is useless to enquire into its legality.

IV. No law is cited, and none is recollected, which fixes the number of days during which the estate of a bankrupt is to be advertised. In directing the second sale, the court might consider the previous notice already given.

V. The order, under which the property was offered for sale, was posterior to the injunction and was perhaps given on the consideration of subsequent facts. It was not opposed, or if it was, no appeal was taken from the opinion of the court, overruling the opposition.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

East'n. District, *May* 1825.

SAULET *vs.* DREUX'S SYNDICS.

Trabue for the plaintiff, *Morel* for the defendants.

MAYNER vs. *ROLLINS.*

A synallagmatic contract, not made in as many originals, as there are parties, may be used as a beginning of proof.

A fortiori, when it is so made, but the mention of this circumstance is omitted.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff alleges that by a written instrument it was agreed between him and the defendant, that he should build a house and find certain materials, and the defendant should pay therefor $1200; and that as soon as the house should be advanced to a certain degree, the defendant should deliver and make title to a certain slave to the plaintiff, and should afterwards complete the payment in the manner set forth in the agreement; that accordingly the plaintiff procured the materials and so far progressed in building the house that he was entitled to demand and receive the slave, but the defendant refused to deliver him, and discharged and exonerated him from further progress in building the house.

The defendant pleaded the general issue, averring that the plaintiff imposed himself on the defendant as a carpenter, able to build and

complete the defendant's house, while in fact, he was no carpenter, and lacked the necessary skill; that he spoiled materials of the value of $600, which the defendant is bound to pay for; that he did not build the said house, nor progress therein, as he has stated.

There was a verdict as in case of nonsuit. Judgment was given accordingly, and the plaintiff appealed.

Cooper deposed he was the plaintiff's foreman, while he was building the house mentioned in the petition; he had the contract in his possession while drafting the building, the defendant seeing it in the witness' hands, desired him to keep it as there would be some dispute about the building. The witness saw a copy of it in the defendant's possession, and heard both parties read the contract and copy.

On the trial the plaintiff's counsel took bills of exceptions to the opinion of the court.

In refusing to allow the reading of the contract, as it contained synallagmatic obligations, but no mention of its being done double.

In refusing to allow parol evidence of the furnishing materials, and progress in building the house, the nature and value of the work and the breach of the contract by the defen-

Eas'n. District. May 1825.

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dant, on the ground that a written contract was alleged, and had no other proof but the instrument produced, which was void, as it did not contain mention of its being made double.

We think the judge erred in both instances. It is not averred that the contract was not made double. There is evidence, not excepted to, on the record that it was.

The objection is only, that no mention is made of this circumstance. The part of the code in which this mention is ordered is *imperative*, not *prohibitive*, and it is only the breach of law of the latter kind that imports the nullity, when it is not formally expressed. *Civ. Code*, 306, *art.* 27, 4, *art.* 12.

We have lately held, that even when the contract is not made in as many of the originals, as there are parties, the writing may be used as a beginning of proof, and the contract is not absolutely void; *a fortiori*, when it is made in the requisite number of originals, and nothing is omitted but the mention of this circumstance.

After the plaintiff had established his contract with the defendant, by eking out the incipient proof resulting from the imperfect writing, by other legal evidence, testimony was

the only means of establishing the nature of his work, and whether he had so far complied with his engagement, as to be entitled to demand the delivery of, and title to the slave.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, the verdict set aside and the case remanded with directions to the judge not to allow the reading of the judgment, notwithstanding the omission of the circumstance, of its having been made double, and to receive parol evidence of the nature, quality and value of the work done by the plaintiff; and it is further ordered that the appellee pay costs in this court.

Watts and Lobdell for the plaintiff, *Morse* for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n. District. *June* 1825.

FLOOD & AL. vs. SHAMBURGH.

EASTERN DISTRICT, JUNE TERM, 1823.

FLOOD & AL. vs. *SHAMBURGH.*

Where the the rules of court do not require a replication, all means of defence are left open to the plaintiff.

The widow who accepts the community, may be sued in the district court.

The wife who has taken an active part in the community, or has not made an inventory, cannot renounce.

What is full value in money for a note,

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petitioners state that in the beginning of the year 1823, the late William Flood being in want of money applied to defendant for various sums, which were lent him and which he repaid with usurious interest; that among other transactions he gave his note to defendant on the 6th of January, 1823, for $10,000, on an usurious loan, and made a mortgage without any consideration for the same sum of $10,000. That the defendant has frequently and publicly declared, that the estate of Flood was in-

debted to him in both the amount of the note and the mortgage, and that he would institute suit on both, and claim the sum of $20,000 with interest and costs.

They further state that by reason of these allegations they have been hindered from selling, and disposing of the estate, or settling the demands against it. That they have frequently and amicably requested the defendant to present his claim, which he refuses to do, but continues to boast of his demands, and prevents the petitioners paying one James Erwin who is a creditor of the estate.

The prayers of the petition are:

That the defendant may be ordered to set forth distinctly the nature of his claims against the estate of Flood.

That he may be ordered to institute suit thereon within ten days from the service hereof, or on making default, that it may be declared the estate is not indebted to him.

That the mortgage may be declared null and void.

That the defendant may be condemned to pay the petitioners the sum of of $24,000 for his unjust boasting.

That he may be condemned to refund and

is a question of law.

Usury may be committed by agreeing to take the legal rate of interest, on a larger sum than that really lent.

East'n. District. June 1825.

FLOOD & AL. vs. SHAMBURGH.

pay $2,000 received by him for usurious interest, between the 1st of January, 1815, and the 1st of January, 1824.

That he may set forth in his answer all the circumstances attending his transactions with the deceased.

The answer denies, that the defendant did ever jactitate, or boast, he had a claim against the estate of William Flood for $20,000, or that he had refused or delayed to bring his suit on the note due him, or in any manner impeded the settlement of the estate; but that on the contrary, he and one James Erwin filed a petition in the court of probates, praying to be paid the amount really due; and afterwards filed another to the like effect against the widow as curatrix of the minor children. That these proceedings were stopped in consequence of an agreement made with the executors, that they would deliver notes received for the sale of property of the estate, which agreement they have failed to comply with. Judgment is therefore prayed by way of reconvention, for the sum of $10,000 with interest and costs.

The answer proceeds to deny that the consideration of the note and mortgage is, or was usurious, or that the deceased paid him ille-

gal interest, between January, 1815, and 1824. That the note was given for money loaned to Wm. Flood in his life time at a year's credit, and that the mortgage was given to secure the same. It concludes by praying judgment against Mary Flood who has accepted the community, and against the minor heirs.

The cause was submitted to a jury on special facts; upon their finding the court below gave judgment in reconvention against the plaintiff, for $8,800, with interest at ten per cent. from the 6th of January, 1824, until paid and costs of suit. The defendant appealed, and the plaintiffs have prayed the judgment should be amended in their favor.

The first question necessary to be decided is, the legality of the judgment in reconvention in reference to the plaintiffs, who are minors, and who have necessarily accepted the succession with the benefit of an inventory. As neither the rules of the court in which this case was tried, nor the law, require a replication to the answer, it is consequently open to every objection which could have been *pleaded* to it. Now it is clear that an ordinary action could not be maintained in the district court against minor heirs, who administer a succes-

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sion through the agency of their tutors or curators, for debts due by that succession; at least not unless it was shewn the estate had been settled according to law, and that a partition had taken place between the heirs. This principle admitted, the only thing left for inquiry in this case is, whether the jurisdiction can be acquired, by the plaintiffs having drawn the defendant before that tribunal. We are very clear it cannot. They could only bring the defendant there, for the examination of matters of which the court could take cognizance,

This view of the subject leads us to an examination of the correctness of the course pursued by the plaintiffs in instituting this action. The petition as we have seen, embraces several matters, some of which we conceive were properly cognizable by the district court, and others were not. In the first we include the claim to recover back illegal interest paid on other considerations, than the money now claimed by defendant from the estate. We also include the demand in damages, for setting up false and injurious pretentions against the succession. These could be fairly brought before the district court, because they were separate and distinct demands by the estate

against the defendant, who was not suable before the court of probates.

But that part of the petition which after acknowledging a debt due, calls on the defendant to state its nature and amount, we consider irregular and contrary to law; as we do all the proceedings which were predicated on it. We can see no object in such an investigation. The district court could not regularly execute its judgment, for the assent, and order of the judge of probates would still be necessary to enable the plaintiff in reconvention to execute it. The whole proceeding supposes jurisdiction in the district court for the purpose of enquiry alone, and for this purpose we have said, that court does not possess it. This point received a particular examination in the case of *Vignaud* vs. *Tonnacourt's curator*, 12 *Martin*, 234. See also *Civ. Code*, 178, *art.* 137,

Our law has affixed a sufficient penalty on creditors, who do not present their claims against a succession administered under an inventory, to suppose they will delay bringing them forward before the proper tribunal. It is time enough when they present them, to offer those exceptions which will reduce their claim, and it is mere wantoness to drag them before

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an other tribunal, in order to investigate matters which could more properly be offered as an exception to their demand, when they came before that court, which alone has the means and the power to terminate the matters in contestation. What is conclusive against the regularity of the course of proceeding resorted to in this instance is, that notwithstanding all the litigation in this action, the defendant might, on going to the court of probates with his judgment, be compelled to discuss again, with the other creditors, all the matters and things at issue in this suit. *Novissima Recop. lib.* 11, *tit.* 28, *ley* 3

Confining out attention then to the verdict on those matters of which the court could take cognizance, we find the jury have expressly negatived the fact of the defendant having received usurious interest on the loans of money other than that for which the note still due, was given; and, they have also found, the defendant never did set up such a claim as is charged in the petition. There must be final judgment therefore against the plaintiffs on both these demands.

But there is still another and important question open, and that is whether the judgment in

reconvention against the widow, must not be affirmed.

Its correctness, independent of the matters which are peculiar to the present case, depends on the extent of her responsibility on accepting the community. If in doing so, her liability for one half of the debts, depend on whether the amount received by her from the community equals the moiety of the sums due by it: or in other words, if she take under the benefit of an inventory, then claims against her must be presented in the court of probates; for she is nothing more than administrator of the estate, and it is right, that all the creditors should have an opportunity of presenting their claims, and getting a proportion of the common fund left for the payment of debts. If on the contrary, by the act of acceptance, she becomes responsible *personally* for the one half of the debts, she may be sued any where.

In the investigation of this subject, finding the provisions of our code not so clear and explicit as could be desired, we turned to the ancient law of the country. It has afforded us, however, but little assistance. There existed no legislative enactment in Spain on the matter, and the authors who have written on this

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branch of her jurisprudence differ in opinion: the better one perhaps, was, that after accepting, she could not renounce, on discovering the effects of the community, not to be equal to one half of the debts due by it. *Febrero, p.* 2, *tit.* 1, *cap.* 4. § 3, *nos.* 71 *and* 72.

Our code has so far altered the law, as to give the widow the right of renouncing at any time, *Civ. Code*, 338, *art.* 78. But in order to enjoy the privilege she must not have taken an active concern in the affairs of the community, and she must have made an inventory. If she has done the one, or fails to do the other, she cannot renounce; and in those cases where she cannot, we are of opinion she is responsible for the one half of the debts; whether the one half of the property of the community be equal to them or not. We found this opinion on two articles of our code; one of which declares, that in the partition of the effects of the partnership of community of acquests and gains, both husband and wife are to be *equally liable* for their share of the debts contracted during marriage: the other provides, the wife and her heirs *may exonerate themselves* from the debts, by renouncing. If she be equally liable with the husband, and only one mode is pointed out by

which she can escape that responsibility, she is clearly responsible in her own right, unless that mode has been pursued.

It has not escaped our attention, that the heirs of the husband could free themselves from personal responsibility by accepting the succession with the benefit of an inventory; and that it may be urged, this opinion makes the wife incur a heavier responsibility. But the difference is rather in the means, than in the end. Inventory, and acceptance under it, are sufficient to enable the heirs to escape responsibility in their personal capacity. Inventory and renunciation are both required to enable the wife to enjoy the same privilege; and if both be made, they have the further effect of freeing her from the trouble of administering the estate.

We are greatly strengthened in this opinion from an examination of the Napoleon Code. That body of law formed as it is well known the *substratum* of the civil code of this state, and so many of its provisions were incorporated *verbatim* into ours, that whenever we find several of its regulations adopted on a particular subject, and a material one omitted, we may safely conclude, that omission proceeded from a difference of opinion in the framers. Now by

the 1483d article of that code, the wife is only responsible to the amount of the inventory, and renunciation is not necessary, to protect her from being answerable in her own right.

In this case the widow accepts the community by bringing suit to have part of its effects adjudged to her. Nothing appears on the record which shows a renunciation, or a right to make it. She is therefore responsible in her personal capacity for one half of the debts of the succession, and was properly sued in the district court.

It only remains to enquire for what sum judgment should be given against her. It has been contended the case is not in a situation for final judgment in consequence of the contradictory finding of the jury, on the first and fourth facts submitted by plaintiffs. The apparent discrepancy which the verdict exhibits on these facts, is removed by an examination of the pleadings, and the issue joined. The first is evidently in relation to the demand for illegal interest already paid. The second refers to the contract sued on.

The jury have found the defendant gave $8,800, for a note of the plaintiff's ancestor, payable in one year for $10,000. In answer to

the 6th fact submitted on the part of the defendant, they state he "gave the full value for the note." What sum of money is *full value* for a note of the borrower payable at a future day, is a question of law not of fact; as the law has declared that not more than a certain sum shall be taken for the loan. This part of the the verdict therefore, cannot be permitted to influence the judgment of the court.

The strongest objection against the finding of the jury, as not sustaining the plea of usury, was, that it only states *what money* was given for the note, and *non constat* there might not have been *money and other property* given for it. This argument would have considerable weight, were it not for the judicial confession of the defendant in his answer, "that the note was given *for money loaned*, to William Flood, at a year's credit."

We consider then the fact to be clearly established that the note for $10,000, payable in one year, was given for $8,800. The judge below thought this agreement was usurious, and that under it no more than the original sum lent could be recovered. But he was of opinion that, as by a subsequent act of mortgage passed to secure the payment of this note,

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the borrower had stipulated to pay interest at ten per cent. if it was not regularly discharged at the end of the year, that rate of interest could be recovered on the sum really lent, from the date of the failure to comply with the original contract.

We agree with the judge, in the conclusion to which he came on the first agreement, and are unable to concur with him in regard to the second. Both contracts appear to us equally usurious. The first was to get twelve per cent. on the loan of $8,000, for one year; and the second was to receive ten per cent. on a sum made up in part of this usurious interest. Now whether the law be violated by taking a promise to pay fifteen per cent. on the loan of $1000 for one year; or by an engagement, the borrower shall pay ten per cent. on $1,500, when only $1000 are lent, the consequence must be the same. For there is no difference between the two cases just put, except in the mode chosen, to avoid the prohibition to take more than legal interest on money lent. The law has not been so improvident, as such an argument supposes. It annuls all "*contratos simulados en fraude de usuras.*" To know whether a contract comes within the provisions of this

law, we have only to enquire how much money was lent, and how much was to be paid for the use of it. If the latter exceed the rate of interest which the law permits, it is a matter of no consequence how, or in what manner the promise was made, or what consideration is *avowed* for it. *Novissima Recop. lib.* 10, *tit.* 1, *ley*, 20.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. And proceeding to give such judgment here, as in our opinion should have been given in that court. It is ordered, decreed and adjudged, that there be judgment against the plaintiffs on the matters and things claimed by them in their petition, saving to the minor heirs in the court of probates any exception they may have to the claim of defendant for moneys lent to their ancestor William Flood. And it is further ordered and decreed, that the defendant in this cause, and plaintiff in the demand in reconvention, do recover of Mary Flood, the sum of four thousand four hundred dollars, with costs in both courts.

Hoffman for the plaintiff, *Hennen* for the defendant.

East'n. District. *June* 1825.

WHITE & AL. vs. NOLAN.

If a contract be not obligatory when entered into, a change in the law cannot make it so.

The *allegata* and *probata* must agree.

WHITE & AL. vs. NOLAND.

APPEAL from the court of the fourth district.

PORTER, J. delivered the opinion of the court. The defendant is sued as the endorser of two promissory notes, he pleaded the general issue; there was judgment against him and he appealed.

Part of the sum for which these notes are payable, is expressed in figures. They bear date the months of June and November, 1823, a period at which there was an act of the legislature of this state in force, which declared that no note should *be obligatory, or admissible in evidence* unless the sum of money mentioned or specified therein to be due or payable, be expressed in words at full length. That statute has since been repealed. But if the notes were not obligatory at the time they were given, a subsequent change in the law cannot make them so. *Acts of* 1823, 36, *acts of* 1825, 58.

There has been a great diversity of opinion in the profession, as to the true construction of the law just referred to. Some contend that the note or obligation is good so far as it is written in words at full length, and that the part ex-

pressed in figures must be rejected as surplusage. Others insist it is void in toto, and is not admissible in evidence. The question has not been settled by judicial determination. All however agree that the part expressed in figures, is, as if it were not written, and makes no part of the obligation.

Such was the decision of this court in the case of *Pilié* vs. *Mollere*. We have then in the present case notes declared on, different from those offered in evidence, and the question is whether the judge erred in admitting them. We think he did; the question is precisely the same as that decided in the case just referred, where the subject was gone into at full length. *Vol.* 2, 666.

The judge *a quo* in deciding the case against the defendant, took a distinction between the maker and endorser, and considered the latter responsible, on the ground that he put in circulation a note as the representative value of the sum mentioned therein, making it good for that sum, in case it should not appear to be valid against the drawer. This distinction cannot receive o[illegible]

East'n. District. *June* 1825.

WHITE & AL. vs. NOLAN.

is considered as the drawer of a bill. 12 *Martin*, 184, 2 *Phillip. on Ev.* 10, 17, 41. If the part of the sum expressed in figures is to be considered not written as to the maker, so must it as to the endorser, whose obligation cannot extend beyond the sum for which the note appears on the face of it to be binding on the maker, or in other words, the sum legally expressed in the instrument.

On the whole it appears to us the court erred in permitting the notes offered in evidence to be received, for they did not correspond with those declared on. The petition states two notes, one for $284 30, the other for $295 66, these offered had no cents expressed in them except in figures, which we are bound to consider as not written.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendant as in case of non suit, with costs in both courts.

Preston for the defendant.

BARBARIN vs. DESCAHAUT'S HEIRS.

East'n District. June 1825.

BARBARIN vs. DESCAHAUT'S HEIRS.

In an action against the drawer of a bill of exchange, it is necessary to set out demand and notice, or judgment will be arrested.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. The defendants, heirs of Madam Descahaut, are sued on a bill of exchange, drawn by their ancestor in St. Domingo, on the 12th of January, 1796, on one Rossignol Grammont in Philadelphia, in favor of Reynaud, by whom it was endorsed to the petitioner.

The petition does not allege either protest for non-payment, or non-acceptance, nor notice to the drawer.

But there is an averment that part of the sum was paid, and that the ancestor of defendants died without having paid the balance, though frequently requested so to do.

No answer was put in by the defendants, judgment by default was regularly taken, and the same confirmed on proof being furnished of the genuineness of the signatures to the bill.

The defendants have appealed, and assigned for error apparent on the face of the record "that the petition alleges neither demand on the drawer, nor protest for non-payment, or non acceptance.

Eas'n. District. June 1825.

BARBARIN vs. DESCAHAUT'S HEIRS.

On the argument in this court, the counsel have went at large into the merits, but the manner in which the cause comes up, prevents us from examining them. The defendants did not appear below, no answer was put in, no issue joined; consequently, there could be no trial which would bring the evidence legally before us. The judgment by default, and its confirmation, presuppose proof sufficient was furnished to authorise it. The only ground on which it can be assailed is, that admitting all the plaintiff has alleged to be true, the law does not permit judgment to be given against the defendant.

We conceive the only question before us to be, does the petition set out a cause of action It wants all the averments which are necessary to shew responsibility in the drawer of a bill of exchange, it neither states protest, nor notice, nor makes any allegation the want of them was waved. It states part of the money was paid, but whether by the endorser, drawee or drawer, we are not informed.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that there

be judgment for the defendants as in case of nonsuit with costs in both courts.

Moreau for the plaintiff, *Seghers* for the defendants.

BOWMAN vs. *FLOWER.*

APPEAL from the court of the third district.

If the jury, instead of deciding on conflicting evidence, make a compromise between the parties, the cause will be remanded.

If the evidence be equal, the decision should be against the party holding the affirmative.

PORTER, J. delivered the opinion of the court. The pleadings in this action show that it is a petitory one. The real question between the parties is the true boundary of the grants under which they hold. The cause has been tried three times. On the first trial there was a verdict for the plaintiff, which the court below set aside. On the second the jury found for the defendant, and the court confirmed it. On appeal that judgment was reversed, and the cause remanded, in consequence of illegal evidence having been permitted to go to the jury. It now returns to us with what has been called a special verdict, which on the face it does not state to be either, for the plaintiff or defendant, but which we presume is most favorable to the pretensions of the former, as he

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BOWMAN vs. FLOWER.

appears in this court as appellee, and has endeavoured to support it.

The defendant's grant is the oldest. The plaintiff's calls to bind on it. And the point most litigated between the parties has been what are its true boundaries. The defendant insists it is a line drawn due east from a certain tree on the back line represented in the plat of survey before the court by the letter D. The plaintiff contends, it is a tree standing on the front marked A., which indicates where the true dividing line between him and the defendant commenced; and that by giving the line a due west course from this tree, until it strikes the back line of the patents, the true boundary of the defendant's grant, and the correct limit between him and the plaintiff is shown.

To these two points the whole attention of the parties appears to have been directed, and all the evidence introduced, tends to support one, or other, of these limits. The verdict of the jury disregards both. Exercising the powers of "amicable compounders," they decline weighing the evidence, and give a line for a boundary which is not that claimed by either party, nor as far as we can gather from the record, supported by any evidence to be found in it.

The intention of the jury was no doubt good. They desired to compromise, what they found difficult to decide. But this they had no power to do. If the evidence when put in the scales brought the beam so even, that they could not tell to which side it leaned; it would seem to us the decision should have been against the party holding the affirmative. That is, against the plaintiff, for the land which he averred the defendant illegally retained possession of, and against the latter for the claim set up in his answer; or in other words against the petitioner who commenced the action, as that would have negatived the pretensions of both. 12 *Martin*, 260, *vol.* 2d. 494.

Cases of this kind are emphatically proper to be tried by a jury, and by a jury of the vicinage too, who know the localities, and are enabled from this knowledge, to test the correctness of contradictory testimony. Had the jury who tried this cause, decided either one way or another, on the points really at issue, and contested, we should have felt great reluctance to put our judgment against theirs; but the verdict we are called on to sanction, comes not before us, with any of these considerations to support it. It is not deciding on the weight

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of evidence, but giving a decision without any to support it. This we feel we have no authority to sanction; more especially as the verdict does not meet our ideas of the justice of the case.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed, that the case be remanded for a new trial, and that the appellee pay the costs of this appeal.

Watts and Lobdell for the plaintiff, *Woodruf* for the defendant.

ABERT vs. *BAYON.*

Failure of plaintiff to comply with a condition precedent, may be taken advantage of on the general issue.

APPEAL from the court of the second district.

PORTER, J. delivered the opinion of the court. The parties to this suit were partners, or rather owners in common of various objects, and particularly of a tract of land or plantation situate in the parish of Lafourche. Difficulties arose in regard to the dividing of this property, and they terminated by a *transaction*, according to which it was agreed, the plantation should be sold on a credit of one, two, and three years.

A public sale took place in pursuance of this

agreement, at which sale the petitioner became the purchaser of the plantation, at that time in the possession of the defendant, but which by the terms of the sale he bound himself to deliver on the first of January, then next ensuing.

The petition states that the defendant illegally and tortiously refused to deliver to the plaintiff the property which she had purchased; and that since the period of his refusal the buildings and improvements have been consumed by fire. She prays the sale may be rescinded, and that she may have judgment for the sum of $8000, the damages sustained by her in consequence of the failure of defendant to comply with his contract.

The defendant pleads,

1. That by the 22d article of the transaction referred to in the plaintiff's petition, the present cause of action, if any exist, ought to be decided, and alone inquired into by arbitrators; and that the defendant has been always ready to answer before that tribunal which alone has authority in the premises.

2. That the matters and things now at issue, have been already decided between the parties.

3. And lastly, that all the allegations in the petition are untrue.

East'n. District. June 1825.

ABERT vs. BAYON.

The cause was submitted to a jury who found for the plaintiff, and assessed her damages at $3000. The defendant appealed.

Various points have been made in this court by the counsel for appellant, we find it unnecessary to notice any, but that, which compels us to remand the cause.

By the fifth bill of exceptions it appears the defendant offered to prove the refusal of the plaintiff to furnish endorsed notes for the amount of the purchase money of the plantation; which testimony was rejected by the court.

The reasons for this decision are not given in the bill of exceptions, but we learn from an opinion delivered by the judge on a motion for a new trial, that he refused to admit the proof offered, because it was not pertinent to the issue joined between the parties. That if the defendant intended to rely on any matter which justified his non-compliance with the contract, he had entered into: such matter should have been specially pleaded.

The petition states the plaintiff purchased property at a public sale made in consequence of a *transaction* between her, and the defendant; that he agreed to deliver it; that he failed or

refused to do so; and that in consequence of this failure she has been injured to the amount of $8000.

The answer denies generally, and specially, all and singular the facts and allegations in the petition; and denies the defendant is indebted in manner and form as is alleged, or in any other.

The *transaction*, the sale, the failure to deliver, and the damages ensuing thereon, are therefore all put at issue by this answer; and all were necessary to be proved to enable the plaintiff to recover.

The *transaction* and the *process verbal* of adjudication were both produced. The latter states, a sale was made on the 23d of June, 1822, on account of A. Bayon (plaintiff) and veuve Lewis Bourdier (defendant) and the conditions on which it was made, among others were the following: "The plantation to be delivered on the first of January next, the purchasers specially mortgaging the immoveables, and giving their notes endorsed to the satisfaction of the sellers." By the 45th article of the *transaction*, it is declared the purchasers shall not receive possession of the property sold at auction, until they state who are their endor-

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sers, and such endorsers are approved; and by the 42d article it is expressly stipulated, that if either of the parties to the agreement shall purchase at auction, they must do so on the conditions prescribed for third parties.

According then to the evidence introduced by the plaintiff, and necessarily introduced by her, for without it she would not have established even the cause of action set out in the petition; certain things were necessary to be done by her before she could claim a delivery of the premises: in other words, there was a condition precedent to be performed by her, before the obligation on the part of the defendant became complete.

The question then presented for our decision is, whether the defendant can take advantage of this condition without specially pleading it?

It might perhaps be sufficient in support of his right to do so, for him to urge, that if this case is to be decided by strict & technical rules of pleading, the first fault was committed by the plaintiff. It being a well established doctrine, that where the right of action depends on a condition precedent, its accomplishment should be set out in the declaration; otherwise if the right is once vested and defeated by matter *ex post facto*. 6 *Bac. ab.* 339, 7 *Co.* 10.

If under the liberal mode of practice wisely established in this state, such strictness be not necessary, still the rights of the parties under the evidence offered, are not the least altered, or impaired; and they have the same right to insist at the trial, that the plaintiff has failed to show a cause of action; that they would have under a more technical system by taking advantage of it in pleading.

The judge of the district court in the opinion delivered by him on the motion for a new trial, seems to have considered, nothing to have been put at issue but the averments in the petition; and that what the defendant relied on, was matter of avoidance which should have been specially set up.

The judge was correct in saying, that nothing but the averments in the petition were put in issue. But that petition avers a sale, positive, and unconditional. The proof introduced shows a conditional one. The defendant might perhaps have objected to the variance, but if he chose to admit it, it was received with all legal consequences that flowed from it; as proof the defendant promised to deliver the plantation; but as proof too, that he was not to

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deliver it until the plaintiff should comply with the condition expressd therein.

The judge therefore, though correct in considering that nothing was put at issue but the averments in the petition, erred in the effect which he gave to the evidence by which those averments were supported. And he particularly erred in imagining this was special matter in avoidance, which should have been set out in the answer. Matters in avoidance acknowledge the obligation to have once existed by averring these matters to have discharged it. They cannot therefore be given in evidence under the *general issue*, because *by it* the plaintiff only comes prepared to prove the defendant made such a contract as is alleged.—But in this instance the appellant does not rest his defence, on the fact that his obligation to deliver the land, was discharged by matters and things which avoid it. He insists that up to the moment of trial, *no obligation had existed on his part to deliver it*, because an act necessary to create that obligation had not yet been performed by the plaintiff. This we are satisfied he should have been permitted to shew under the general issue, either by relying on the evi-

dence introduced by plaintiff, or by any other proof in his power.

It is therefore ordered adjudged and decreed, that the judgment of the district court be annulled avoided and reversed; and it is further ordered, adjudged and decreed, that this cause be remanded for a new trial, with directions to the district judge not to reject evidence of the defendant to shew the plaintiff refused to furnish endorsed notes for the amount of the purchase money of the plantation; and it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Cuvillier for the plaintiff, *Morel* for the defendant.

MARIGNY vs. *HUNT*.

APPEAL from the court of the first district.

Real actions are those in which a specific thing is demanded, whether moveable or immoveable.

An application for an order of seizure and sale, should be made to the judge of the place where the debtor resides.

PORTER, J. delivered the opinion of the court. The only question in this case is, whether an application for an order of seizure and sale against mortgaged property in the hands of a third possessor, should be made to the judge of the district where said possessor resides, or

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to him within whose district the property is situated. The defendant contends it is the latter, and of that opinion was the judge of the first instance, who after hearing the parties, made absolute the rule to set the order of seizure aside. The plaintiff appealed.

The appellee contends this is a real action, which must be brought in the place where the property is situated.

Admitting it to be a *real* action, the conclusion drawn by the defendant is not correct.

By the laws of Rome and Spain, all actions were considered *real*, that had for their object the recovery of any specific thing, whether it were moveable or immoveable. *Quæ specialis in rem actio locum habet in omnibus rebus mobilibus, tam animalibus, quam his quæ anima carent, et in his quæ solo continentur. Digest, lib.* 6, *tit.* 1, *l.* 1 *&* 9. *Inst. lib.* 4, *tit.* 4, *l.* 1. *Febrero, p.* 1, *cap* 4 § 4, *n.* 70.

But it is clear that by our jurisprudence, though we should admit, in reference to the ancient laws of the country, that an action for a horse, a bale of merchandize, or a flock of cattle, was a *real* action; the place to bring it would be the residence of the person sued, not that where the moveable was situated.

So it was in Rome and in Spain, and they do not seem to have made any distinction whether the thing were moveable or immoveable. *Actor rei forum, sive in rem, sive in personam sit actio, sequitur.* *Code* 3, *tit*, 19, *law* 3. *Par.* 3 *tit.* 3, *law* 4, *Novissima Recop. lib.* 11, *tit.* 4, *ley* 9.

There were exceptions to this rule in both systems. The principal one in the Roman law was, where the suit was against a possessor, who claimed to hold it for another. In that of Spain, the same limitation to the general principle was adopted, with some others not necessary to be stated, as the instance before us is not one of them. *Code, liv.* 3, *tit.* 19, *law* 2 & 3. *Par.* 3, *tit.* 2, *law* 32.

Our statute has provided "that no person or persons having a permanent residence shall be sued in a civil action, in any other parish, but in that wherein he she or they shall habitually reside, any law to the contrary notwithstanding." No direct exception is shewn in the ancient law of the country, in regard to an hypothecary action, which would prevent the statute having its effect; and from its being so positive in its terms, and using negative expressions, a very strong case indeed must be shewn, to authorise a court to say, the provisions of this act did not apply to it.

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Considering therefore an application for an order of seizure and sale as the commencement of that proceeding known to our law as the *juicio executivo*, we think the judge of the place where the debtor resides, alone has authority to grant the order. *Tilghman* vs. *Dias.* 12 *Martin*, 691.

But in this particular case, it is not the mortgagor, but the possessor of the mortgaged property who has contested the regularity of the proceedings. With regard to such persons the law of Spain declares, they may be pursued *wherever the principal debtor can*, as the property mortgaged passes to the third possessor, *ipso jure*, with this burthen. It is unnecessary for us to say, whether the statute already referred to, has not wrought a change in this matter, where the *tercero poseedor* has his permanent residence in a parish other than the principal debtor; because in the instance before us the defendant and mortgagor both resided within the same jurisdiction, and whether we consider the case under our own statute, or by the exception contained in the antient laws of Louisiana, the proceedings had here, were legal, and must be confirmed. *Cur. Phil. p.* 2, § 11, *n.* 17.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court setting aside the order of seizure and sale, be annulled, avoided & reversed, and it is further ordered, adjudged and decreed, that the original order of seizure and sale, granted by the judge of the first district, be revived and reinstated; that the case be remanded to the district court to enable the plaintiff to proceed according to law, and that the appellee pay the costs of this appeal.

Dumoulin for the plaintiff, *Pierce* for the defendant.

SKIPWITH & AL. vs. GRAY.

Plaintiff cannot proceed at the same time with an order of seizure and a suit in the ordinary way.

If they be both resorted to, the *via executiva* merges in the *via ordinaria.*

APPEAL from the court of the third district.

PORTER, J. delivered the opinion of the court. The petition sets out a public act, by which the defendant mortgaged to the plaintiffs, certain land and slaves in the parish of East Baton Rouge. It prays for an order of seizure and sale, for a certain sum which it states to be due, and that the defendant may be cited, and judgment rendered against him with costs.

Several objections were taken to the regu-

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larity of this proceeding. We deem it necessary to notice those only, which we consider decisive of the case.

It is objected first, that the plaintiffs cannot proceed at the same time with an order of seizure and sale; and an action in the ordinary way to obtain judgment.

This question received a very particular examination from the court in the case of *Gurlie and Guillot* vs. *Coquet*, decided last April term. We there came to the conclusion after an examination of the Spanish authorities, that both ways could not be pursued at the same time; and that if both were resorted to, the *via executiva*, merged in that of the *via ordinaria*.

The judgment rendered in that case, remanmanded the cause to be proceeded in, according to the ordinary and legal course of actions instituted in the usual form; and this case would receive a similar one, were we not met by an objection taken in *limine litis*, that the court in which the action was instituted, had no jurisdiction of it.

In the opinion just read, in the case of *Marigny* vs. *Hunt*, we have expressed our ideas in relation to the action of mortgage, and the tribunal before which it should be com-

menced. It would be useless to cite again the authorities, and repeat the same reasoning here. Our conclusion is principally drawn from the statute, which declares, that, no person shall be sued in any civil action in any other parish, but in that wherein he shall reside, *any law to the contrary, notwithstanding.* Admitting any previous law to the contrary were shown, it would be a matter of very serious doubt, if this statute did not repeal it; but the industry of counsel has not furnished us with any, and our own researches have been equally unsuccessful.

We have, however, been referred to the act of 1817, as it is generally called; passed subsequent to the act already cited, by the 6th section of which it is provided, "that in any real action were there are *two* or *more* persons concerned, and residing in several districts, in matter of partition, mortgage or revindication of real property the judge of the place where the property is situated shall have cognizance of the case."

It is contended that the true meaning of these expressions, "where there are two or more persons concerned," is not two or more persons whom it is necessary to make defen-

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dants; but that where the plaintiff is concerned, and the defendant concerned, there are the two persons contemplated by law, and that in such case, the court where the property is situated, has cognizance of the cause.

If this be the true construction, then it follows, that in no case whatever has any other court jurisdiction, but that where the property is situated, for to every case there must be plaintiff and defendant. And yet, if such had been the intention of the legislature, it is to be presumed they would have said in direct terms, that all actions for real property should be brought where it was situated. The act by enumerating a particular class of cases, in which the action might be brought where the property is situated, justifies the conclusion that *every* case was not embraced by it. The interpretation relied on includes *all*.

That construction cannot receive our sanction. Taking the passage already quoted and reading it with the remaining part of the same section which points out the manner the different parties concerned shall be cited, we have not the least doubt that in the actions of mortgage, and revindication, the law contemplated those cases, where there were two or more persons interested as defendants. In the

action of partition it may suffice to give the court jurisdiction where the thing is situated, that two persons should be parties to the suit, because each has an interest in the thing: neither claims to the exclusion of the other, and consequently, there are two *concerned*, in the contemplation of the law. See the case of *Kilgour* vs. *Ratcliff*, *vol.* 2, 292.

It is therefore ordered, adjudged and decred, that the judgment of the district court be affirmed with costs.

Watts and Lobdell for the plaintiffs, *Hennen* for the defendant.

GUIDREY vs. *VIVES.*

The surety of a note cannot claim the benefit of the law in relation to indorsees.

APPEAL from the parish court of the parish and city of New-Orleans.

PORTER, J, delivered the opinion of the court. This action is brought against the defendant as surety to José Seguro, who executed his promissory note in favor of the petitioner. The answer contains a general denial of the plaintiff's allegations. There was judgment against the defendant in the court of the first instance, and he appealed.

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The only question in the cause is whether the defendant is to be considered as endorser of negotiable paper, or as having put his name on the note out of the usual course of trade as surety for the maker.

The evidence shews the note has never been endorsed by the payee, and that it was in his possession when the defendant put his name on it. The plaintiff on selling his property to the maker of the note, required the defendant should give his signature. This was done, but without any express declaration in what quality he gave it. Taking all the evidence together, we have not a doubt he signed to secure the payment of the note, and we think the parish court did not err in considering him as surety, and giving judgment against him as such. This case indeed cannot be distinguished from that of *Cooley* vs. *Lawrence*. 4 *Martin*, 639.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be affirmed with costs.

Morel for the plaintiff, *Morse* for the defendant.

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APPEAL from the court of probates of the parish and city of New-Orleans.

Plaintiff may prove payment of a written order in favor of defendant without producing it, if the existence of the order be admitted.

PORTER, J. delivered the opinion of the court. This action was originally commenced in the district court, and the defendant having died before it could be tried and decided there, it was transferred to the court of probates.

The plaintiff states that in the year 1821, he entered into a special, or particular partnership with the defendant, the object of which was, the purchase of slaves in the Atlantic states on joint account and risk, to be transported to this state for sale. That 82 slaves had been purchased of which 73 have been sold by the defendant, and the proceeds received by him, and that two others are yet in his possession.

That the remaining seven slaves have been sold or disposed of by the petitioner, for the proceeds of which he has been always willing and ready to account.

That the amount of sales made by the defendant is $41,237, that the balance due the petitioner is $4000, and that the defendant though often requested, has refused to pay this

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sum, or to render a true account of his gestion of the partnership affairs.

The defendant pleaded the general issue, and averred the plaintiff owed him $3000, for which he prayed judgment.

The representatives of the estate of White were made parties in the probate court, and that tribunal after hearing the evidence gave jndgment for the defendant, and decreed that the slaves remaining unsold, should be disposed of, and the proceeds divided between the parties. The defendant appealed.

When the argument was closed, we believed the case was before us in such a shape, as would enable us to decide it on the merits. Further reflection however on a question presented by a bill of exceptions taken on the trial, has brought us to the conclusion that the cause must be remanded.

The plaintiff offered to prove by a witness that he, the witness, had paid to defendant, on plaintiff's order the sum of $250. This testimony was objected to, on the ground, "that the plaintiff could not give parol evidence *of the payment of said order*, as the order itself would be the best evidence, and must be produced."

This objection recognises the existence of the order, and as a consequence of its existence, denies the right of proving its payment in any other way but by the production of the writing itself. Now whether the order would be the best evidence of the payment or not, depends on a fact of which the bill of exceptions gives no information; namely, whether the defendant gave a written receipt on it; for if he did not, it is neither the best evidence, nor any evidence at all against him, that it was paid.

On this ground the witness should have been permitted to testify. The rule in relation to the proof of payments by parol testimony, tho' written receipts should have been given, is carried further in the works which treat of evidence, than it is necessary for us to go, to decide this case. Phillips states, that the defendant may prove by parol, the plaintiff's demand is satisfied, though it should appear, the plaintiff signed a receipt. *Phillips on Ev.* 170. 1 *Espinasse*, 13, 213. 1 *East.* 460.

This rule is perhaps founded on the principle, that as written instruments may be shown to be discharged by parol evidence proving payment: there is no danger of permitting the same kind of proof even when a receipt is given.

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This argument is still open to the objection that it is not the highest evidence of which the case is susceptible. But in this instance there is no proof, there is higher evidence of the defendant's having received the money, the payment of which, the parol evidence was offered to establish.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and, it is further ordered, adjudged and decreed, that this case be remanded with direction to the judge *a quo* not to reject parol testimony of the payment of an order of the plaintiff in favor of defendant on the ground that the order would be better evidence of such payment. And it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Hoffman for the plaintiff, *Strawbridge* for the defendant.

ROBINSON & AL. vs. WILLIAMS.

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Defendant cannot amend his answer without leave of the court, by inserting in it that he will make it more explicit if the plaintiff wish.

Compensation should be specially pleaded.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The plaintiffs claim from the defendant $881 11 cents, balance of account for work and labor done, goods sold and delivered, &c., to Porter and Williams, between the 25th of September, 1822, and 7th of March, 1823.

The defendant pleads that he is not indebted to the petitioners either individually or as partner of the late firm of Porter & Williams; that on the contrary, upon a fair settlement, they are indebted to him in a larger amount, a detailed account of which will be exhibited when required, and which he pleads in compensation to any sum which it may appear is due to said plaintiffs, and if there be a balance due him, he prays judgment against them.

The jury found a verdict for the plaintiffs for $370, which, notwithstanding an application for a new trial, the court below confirmed. The petitioners appealed,

The reasons filed for a new trial, are directed to the incorrect conclusion drawn by the jury from the evidence, with the exception of one, which lays as the ground of the application, an

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error of the judge in admitting proof of the compensation pleaded in defendant's answer.

The answer as we have seen does not set out in what manner the compensation was effected, but states the defendant will set it out when required so to do. Before he was so required, he filed an account, without leave of the court or notice to the opposite party, setting out the different facts on which he alleged compensation had been made.

The plaintiffs state, that this paper was a nullity which they were not obliged to notice, that the defendant had no right to put it on file, without leave of the court, as, if any thing, it was an amendment to the pleadings.

The defendant insists, it was completing the answer, by exercising a right which he had reserved in it, of setting out specially the matters by which the compensation was effected. And that, even rejecting it, he was still at liberty to give these matters in evidence, on the plea of compensation.

We are of opinion the legality of admitting the evidence must be tested by the answer as originally put in. The account afterwards filed can be considered in no other light but an amendment to the pleadings which in our opin-

jon, could not be made, but by leave of the court after notice to the opposite party, or his attorney. Parties cannot change the pleadings or vary the issue, at any moment they please, before trial. The defendant's case is not made better by promising to make his answer more specific, if his adversary should call on him to do so. The plaintiffs had a right to claim the benefit of any defect, which the pleadings presented, without accepting the invitation of defendant, to call on them to amend them.

We think the answer did not authorise the evidence offered. It was presenting distinct matter to destroy the plaintiffs' demand. Notice should have been given of its nature, and amount, in order that the plaintiffs might come prepared to meet it. We know of no case, which calls more emphatically for an observance of this rule than that where compensation is pleaded: for, by law it takes place between mutual creditors *mero jure* without their knowledge. It may arise on a note, or any other evidence of debt assigned to the defendant, and it is impossible for the plaintiff to know, without a special plea, which of the debts he may have contracted is to be offered against him, whether it be not one that is otherwise

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extinguished by payment, novation, prescription, &c.

In the present case, we see by the evidence, that the defence arises out of the imputed negligence of the plaintiffs, in not regularly protesting a note remitted them, and duly notifying the defendant. This should have been specially pleaded in the answer, in order that the petitioners, might have come prepared to show the circumstances, if any such there were, which would have excused the alleged neglect.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that this case be remanded to the district court with directions to the district judge, not to admit special matter in avoidance of the plaintiffs claim, under the answer filed in this cause; and, it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Smith for the plaintiffs; *Hoffman* for the defendant.

EVANS vs. *NASH*.

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EVANS vs. NASH.

The surety on a twelve months bond cannot be released on the ground that the sheriff neglected to file the bond with the execution.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The plaintiff states that on the 1st of May, 1823, he subscribed a twelve months bond, as the surety of Peters, a debtor in execution of the present defendant, at a sheriff's sale. That on the 3d of June in the following year, execution issued on said bond against Peters, and the plaintiff, his surety, and afterwards Peters died. That the said bond, on which the execution has issued, was not returned, as it ought to have been, into the clerk's office, with the original execution against Peters, till one year after it was taken, and ought to have been returned; and the execution against Peters and the plaintiff has issued, not on the demand of the present defendant, but on that of S. Buhler, the sheriff; that the plaintiff is holder, as assignee, of two promissory notes of the defendant for $680 each, either of which exceeds the amount of the plaintiff's bond; and the plaintiff has requested the defendant to subrogate him to his right against the estate of Peters and pay him the balance due, which he utterly refuses to do. The petitioner prayed an

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injunction against the execution in the sheriff's hands, and judgment for the balance due him after payment of the bond, interests and costs, and that he may be subrogated, &c. The injunction issued.

The general issue was pleaded; on the hearing the injunction was dissolved, and there was judgment against the plaintiff for costs; he appealed.

The statement of facts shews that the plaintiff introduced a letter of Guerlain, the signature of whom was duly proved, the execution against Peters, and his and the plaintiff's bond, with an endorsement thereon by the clerk, stating the time of its being filed, the execution on the twelve months bond, and the execution docket, shewing it issued on the demand of the sheriff. A witness deposed he heard that Peters died in New-Orleans, and the printer of Baton-Rouge swore he had published his death, in the gazette of that town, from a New-Orleans paper.

The sheriff deposed he called for the last execution, at the present defendant's request, having his directions for the appropriation of the proceeds.

Guerlain's letter states the death of Peters, a nephew of his wife, who died at his house.

The plaintiff gave no evidence of the notes of the defendant, alleged to be in his possession, which alone justified his application for an injunction.

The circumstance of the sheriff having neglected to file the bond with the original execution, till one year after the date of the bond, was correctly considered by the district judge, as well as the death of the principal as affording no relief to the present plaintiff.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Christy for the plaintiff, *Preston* for the defendant.

BAINBRIDGE vs. *CLAY & AL.*

If a decision of the judge *a quo* render certain evidence useless, the party will be allowed the opportunity of introducing it, if the decision

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. Clay having a judgment against Oldham, and Bainbridge one against Clay, a *fi. fa.* issued on the latter, and was levied on Oldham's money

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be held to be erroneous.

in the hands of Polk, who in the meanwhile emptied his hands, as Oldham's agent, in the clerk's office, in discharge of Clay's judgment, and afterwards Bainbridge's *fi. fa.* was levied in the hands of Polk on the money he had of Oldham.

On a suggestion that Polk had no other money of Oldham's, but what he had paid in court to the credit of Clay's judgment, and that Clay was insolvent; Bainbridge moved that the money in court should be applied to the discharge of his *fi. fa.*

Hennen, claiming the money, as assignee of Clay, on an assignment alleged to have been notified to Polk, before the levy of Bainbridge's execution, opposed the motion.

The court refused to Bainbridge leave to shew that the money attached in Polk's hands and that paid in were one and the same, and that Clay was insolvent, and his motion was overruled.

The first thing that strikes us is the absence of any evidence of Hennen's assignment.

It appears to us that, considering the money as Clay's, the court ought to have permitted the creditor to shew his levy was of no avail, there being no money due by Polk to Oldham,

there then could be no good reason for refusing to order to apply the money in court to Bainbridge's execution.

The appellee urges he did not exhibit his assignment, because it became unnecessary from the view the court below took of the case, and urges the case ought to be remanded; the appellant urges the appellee must recover on the strength of his own case, not on the weakness of his opponents.

We think the appellee was *excusable* in refraining to make proof of his assignment, when the judge *a quo* apparently took it for unnecessary, and that justice will be better rendered by subjecting the appellant to some delay, than by depriving the appellee of a fair opportunity of exhibiting his title, in consequence of an erroneous view of the case, taken by the judge *a quo*, who probably would have refused to receive the evidence, if it had been offered, as unnecessary.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded, with directions to the judge to allow the appellant leave to shew that the levy

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in Polk's hands is of no avail, and that he owed nothing to Oldham, except what he paid in the clerk's office, and it is ordered that the appellee pay costs in this court.

Hoffman for the plaintiff, *Hennen* for the defendant.

TABOR vs. JOHNSON & AL.

The district court is not wholly deprived of jurisdiction, *ratione materiae* in suits for the recovery of debts against a succession.

APPEAL from the court of the third district.

MATHEWS, J. delivered the opinion of the court. This suit was instituted to enjoin proceedings in execution on twelve months bonds, given for the price of property which had previously been sold under execution, and to have said bonds decreed to be null and void. An injunction was granted by the court below, which was afterwards set aside, and judgment rendered in favor of the defendants, from which the plaintiff appealed.

The facts of the case, as exhibited by the record, show that a judgment had been obtained against the tutor of minor children, was executed by seizing and selling property belonging to the succession of their father,

part of which was purchased by the plaintiff in the present suit at a credit of twelve months, and the payment of the price secured by bonds, which he now seeks to have annulled, on account of the alleged nullity of the judgment rendered against the tutor and minors, in consequence of incompetency in the court which rendered said judgment; the whole proceedings having taken place in the district court.

The counsel for the appellant insists.

1. That the district court was wholly without jurisdiction *ratione materiæ* in the case which was prosecuted against the tutor and minor heirs, &c.

2. The judgment pronounced in that case is absolutely null and void, in consequence of such want of jurisdiction.

3. That it is not necessary to appeal from judgments absolutely void, in order to have such nullities decreed, &c.

4. The judgment being thus void, all subsequent proceedings of execution, seizure and sale of property under it are also void and consequently, the appellant's bond given for the price of the property, is a mere nullity. There are some other points relied on by the appellant, which, from the investigation, we are

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about to give to the subject, need not be examined.

Notwithstanding the principle which seem to be established, by some of the expressions this court in the case of *Vignaud* vs. *Tonnacourt's Curator;* (as reported in 12 *Martin*, 291,) after much reflection on the present case, we are inclined to think that district courts are not wholly deprived of jurisdiction *ratione materiæ* in suits which relate to the enforcement of payment of debts due from a succession, to creditors under coutracts with the deceased.

It may be assumed, as undeniable, that the district courts are tribunals of general jurisdiction, that they have, by their constitution, power to decide on all disputes brought before them, which relate to the affairs of the citizens of the state, either as it regards their persons or property. This unlimited power to hear and determine in all cases, can be lessened, altered, and taken way, or rendered concurrent with other courts of the state, only by legislative authority in the enactment of laws, which deprive the courts of general jurisdiction, of part of their power, and transfer it to others, either in relation to the persons of suitors or the subject matter of litigation.

We believe it may be safely asserted, that on the change of government, from its situation under the late territory, to that which it now holds under the power of the state, all the judicial authority which the old superior court had was transferred to the present district courts, with the exception, that judgments rendered by the latter are not final, but may be appealed from.

The power of the late superior court extended to every subject of litigation, except those which were exclusively transferred by the territorial legislature to inferior courts created by its authority. Amongst others thus created; in 1805, courts of probates were established by giving that species of jurisdiction to the judges of the different county courts; their authority was limited to "receiving and taking proof of wills, granting letters testamentary, and letters of administration, also directing and approving appraisements," &c. The same powers were transferred to the parish courts after their institution in 1807. According to these grants of power, the jurisdiction of the superior court, in relation to claims against a succession arising out of contracts made by the testator or intestate, was not in any manner

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lessened or impaired, either expressly or impliedly. Thus stood matters with regard to the jurisdiction of the courts of probates and those of common and general jurisdiction until the adoption of our civil code, in 1808.

We must now enquire how its provisions affected the powers of those two courts.

In the case cited from 12 *Martin*, an explicit opinion has been expressed that the court of probates is the proper tribunal to take cognizance of claims against a vacant succession. This opinion is founded on several articles of the code defining the powers and duty of that species of court, which by necessary implication confer that kind of jurisdiction. Admitting that in relation to a vacant succession, a court of probates has exclusive jurisdiction, it does not follow as a necessary conclusion that the district courts are deprived of it absolutely *ratione materiæ*, but only on account of the peculiar situation of the thing, and of the persons who represent such successions. If inheritances accepted with the benefit of an inventory, whether the heirs be of full age or minors, must be administered in pursuance of the rules established for vacant successions, with the necessary exceptions consequent on the different

situations of these various species of estates; we are necessarily led to the same conclusion in relation to the court, which ought regularly to take cognizance of all matters appertaining to the settlement of successions which are inventoried, appraised and sold, and that is the court wherein all these things are ordered to be done, and to which the law has given the power of determining the manner in which the debts of the deceased are to be paid, and decreeing partition of property amongst the heirs. The provisions of the code on the subject of vacant estates, and those accepted by heirs of the age of majority, under an inventory, seem to require that they should be administered in a manner analogous to that ordered for the administration of the estates of insolvents. In cases of the latter description, all suits and claims against the bankrupt are required by law to be cumulated before the court which holds cognizance of the *concurso*, which may be any of ordinary and competent jurisdiction to the extent of the matter in dispute.

Pursuing the principle established by law for the settlement and distribution of an insolvent's property, our code impliedly requires all the creditors of a succession vacant or accept-

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ed with an inventory, to concur before that court which directs the inventory and sale of property, and possesses the power of classing and ordering payment of the debts. *Civ. Code*, 177, *art.* 108 & 168, *art.* 136 & 137.

In relation to the administration of the estates of minors by their tutors, the code is silent, as to the manner in which the debts of successions are to be paid; according to its provisions, it was the duty of a tutor to cause the whole of the property to be sold, after inventory and appraisment. This power to sell received some limitations and restrictions by an act of the legislature passed in 1814, which last law still left a right to sell for the payment of debts; but is also silent as to the manner in which such payments may be enforced. As the estate is administered under an inventory, perhaps the same rules ought to prevail which govern in cases of beneficiary heirs, and all creditors should appear before the court of probates to demand payment of their claims. This mode would be certainly correct on a suggestion of insolvency of the succession.

Admitting that the rules of the code shew an evident intention in the legislature to give exclusive jurisdiction to the courtr of probates

in all matters relating to successions, it is believed that they were not constituted with powers sufficiently ample to carry into complete effect that intention; because these courts had no authority to call a jury to their aid in the administration of justice; and the ordinance of congress of 1785, which was extended to the territory of Orleans, secured to its citizens the trial by jury. See 2d art. of said ordinance. The right secured, to have this mode of trial, being in general terms extended to all contests which related either to the persons or property of the citizens, could not have been taken away by the territorial legislature, either by express enactment or by any construction given to these laws.

Under such regulations, the creditors of a succession and the persons administering it, had a right to claim a jury to decide any contested fact, and therefore the court of probates was inadequate to maintain exclusive jurisdiction. Our state constitution does not secure the right of trial by jury in civil cases; it limits that constitutional privilege to criminal accusations. Since the change of government the courts of probates have perhaps been possessed of powers sufficient to carry into effect, to the

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full extent the apparent intention of the legislature as expressed in the civil code. There is a decision of this court to be found, 7 *Martin*, 274, wherein an opinion was expressed denying jurisdiction to the court of probates in a claim against a vacant succession, which is in direct opposition to the doctrine established by our judgment, in the case cited from 12 *Martin*.

The court, in the former case, did not take into consideration the increased power of courts of probates, produced by the change in the fundamental laws or constitution of the community. We believe the opinion in that case was erroneous, and that expressed in the last case to be correct, especially as it is subsequent to the act of the legislature of 1820, defining the jurisdiction of the courts of probates.

Taking for granted then the exclusiveness of the jurisdiction of these courts in relation to successions vacant, or claimed under benefit of an inventory, we deem it to be the duty of the other tribunals of the state, in all cases where the matters in litigation are more properly cognizable in the courts of probates, to send such causes before them, to the intent that all

persons interested in a succession, may have their claims investigated and decided on us in a *concurso de acreedores.*

Allowing to the courts of probates exclusive jurisdiction in causes which appertain to estates, administered by persons deriving authority from them, either directly or indirectly, a question then arises whether this exclusion of the courts of ordinary jurisdiction exists absolutely *ratione materiæ* or *ratione personæ?* We are inclined to think that the exclusive jurisdiction depends more on on the peculiar situation of the parties, than on the subject matter of dispute, perhaps somewhat on both. Debts due from a succession must necessarily originate in contracts or *quasi* contracts which existed between the creditors and the deceased. These are clearly subjects for the cognizance of courts of general jurisdiction; but the succession is administered by persons, who act for others and not for themselves, or for others with themselves, as in the case of beneficiary heirs.

These persons are amenable to the court from whence they derive their power, and in that tribunal all matters, which relate to those for whom they act, are most properly cogniza-

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ble by creditors and minor heirs. If sued in any other court, they may rightfully claim to be sent before that, which is more effectually competent both in relation to their situation, and to the matters which concern the administration, and the interest of those for whom they administer. Should a court, not regularly competent, retain cognizance of a cause, and render judgment, as in the present case, it is necessary to enquire what effect such a judgment would produce. Does it import such nullity as can in no way be covered? In other words is it so radically and absolutely void, as to be incapable of producing any effect, or is it affected only by relative nullity.

If, as we have assumed, it be true, that the district court wanted jurisdiction in the case in which the judgment was pronounced, and under which the property was sold by execution, and purchased by the appellant, only on account of the situation of the defendants, and peculiar circumstances of the matter in litigation, it may be fairly doubted whether it be affected by any species of nullity. But we are unanimously of opinion that the sale under it is not absolutely void, but only voidable.

The property of minor heirs, (to place the

case on a footing most favorable to the plaintiff,) was sold without legal or judicial formalities. Such defect of title may be cured by consent or acquiescence; and the purchaser can on no legal ground withhold payment of the price; nor does he shew any equity in his petition, for he only prays to be relieved from the pressure of an execution, without offering to give up the property to the persons whom he alleges to be the legal owners. It would be unjust to suffer him to retain the property and price; should he be hereafter pursued by the heirs for the recovery of the former, they ought in justice and equity to succeed, only on condition of refunding the latter, on its being shewn that it was appropriated to the payment of their ancestor's debts. See *Toulier, p.* 668 & 669, *and* 2 *Birel, Traité des Nulletés, p.* 376.

According to this view of the case, the first and second propositions, used in defence by the appellant, are demonstrated to be untrue, and the third and fourth, being only corollaries of the two former, must partake of their fate.

It is therefore ordered, adjudged and decred, that the judgment of the district court be affirmed with costs.

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Woodruf for the plaintiff, *Watts and Lobdell* for the defendants.

SKILLIMAN vs. *JONES.*

APPEAL from the court of the first district.

The plaintiff need not file any replication.

The return of a citation cannot be explained by parol.

Not even by the sheriff or his deputy.

The remedy, in such a case is to call on the officer to amend.

Fraud may be shown at the trial without having been alleged in a replication.

If there be a replication it may be read to the jury, to place before them a charge that might be made *ore tenus.*

The defendant cannot be admitted to demur to the evidence, unless he admit every fact which the jury may presume from it.

MARTIN, J. delivered the opinion of the court. On the return of this case, which we remanded in February term, 1824, *vol.* 2, 163. The defendant had leave to file a supplemental petition, in which, he stated that, since the institution of the suit, he had paid, satisfied and discharged the plaintiff's claim, according to a receipt. the copy of which was stated to be annexed to the answer; no copy however, was annexed; a jury was sworn, and the defendant having admitted the execution of the note, there was a verdict for the plaintiff, but on the defendant's motion, a new trial was ordered, on the ground that the receipt, mentioned in the supplemental answer, was mislaid, and could not be found at the time of the trial.

The plaintiff, now by leave, replied, that the receipt, mentioned in the last answer, was obtained by fraud and on false pretences, and without any thing having been paid.

There was a verdict and judgment for the plaintiff, and the defendant, after an unsuccessful attempt for a new trial, appealed.

Our attention is first called to four bills of exceptions, taken by the defendant's counsel.

1. The first is to the opinion of the district court, in refusing him a continuance, on the ground that he had not been served, with a copy of the plaintiff's replicatien to his supplemental answer, whereby he was unprepared to meet the charge of fraud.

2. The next was taken, on the refusal of the judge to permit the introduction of the testimony of the sheriff, offered by the defendant, as a witness to explain the return on the citation, and to prove that it was not served in both languages.

3. The third was to the replication being read to the jury, and to the introduction of evidence to support the allegation of fraud.

4. The last was to the refusal of the court to allow the defendant to demur to the evidence, because he had cross examined one of the plaintiff's witnessess.

I. The plaintiff was not bound to file any replication; the defendant's affidavit did not state that he had any witness, by whose testimony

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he could rebut the charge of fraud, whose testimony was not within his reach, and could, if time was given, be obtained.

II. If the return on the citation was not perfectly correct, it could not be explained by parol evidence, even that of the sheriff or his deputy; the proper remedy, in such a case, was to call on the sheriff to amend his return and make it conformable to truth.

III. As the charge of fraud might have been urged on the trial, without having been set forth in a replication, it follows evidence was admissible to support it: and the replication might be read to the jury, to place before them a charge which might have been made *ore tenus*.

IV. The defendant could not be permitted to demur to the evidence, unless he admitted the truth of the fact, which the plaintiff endeavoured by the testimony of Gordon to establish, viz.; that the plaintiff received nothing from the defendant, and consequently, the receipt was fraudulently obtained, or was the evidence of a fact, which did not exist.

On the merits, the execution of the note was admitted, and a receipt produced to establish the payment.

The case stood on the question of fraud in ob-

taining this receipt. The plaintiff introduced two witnesses, Gordon and Farrie.

The first stated that, in a conversation between the defendant and the plaintiff's attorney, he heard the defendant say *he had paid nothing* for the receipt in question.

On his cross examination this witness, being asked whether the defendant did not say he had paid *no money*, but had given some other thing in consideration, replied that he had given nothing for it. The witness, in a conversation with the defendant, advised him not to offer the receipt in evidence, if he had given nothing for it, when the defendant began a conversation relative to some contract between him and the plaintiff, but the witness stopped him, repeating the advice he had given him before. In the course of this conversation the defendant said the receipt had been given for the forfeiture of some contract.

Farrie deposed that when the cause was last called for trial, the defendant, alluding to the receipt on file annexed to one of his bills of exceptions, the original of which was not then known by his counsel to be on file, said he had paid no money for the receipt, and was about

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stating what consideration he had given, when he was stopped by the jury.

We think the district court erred in refusing the new trial. We are not able to discover on what evidence the fraud was found.

Gordon deposes to the part of the conversation, which the defendant and the plaintiff's attorney had in his hearing, he does not give us the whole of the conversation. It is not very probable that the defendant, who sought to avail himself of the plaintiff's receipt, and who was charged with having obtained it fraudulently, would declare to the plaintiff's attorney, in the hearing of a third person, that he had not given any consideration for the receipt, that he had given nothing, without endeavoring to cover his fraud by the allegation of some ground on which he might honestly avail himself of the receipt. We find that in two other conversations which he had with the same witness and Farrie, he urged that although no *money* had been paid, yet there was another consideration for his discharge.

Indeed the very fact of a receipt having been given without any thing being paid, would not necessarily constitute a fraud. One may release a debt due to him, by admitting that it

is paid; and if this admission was made, without any fraud in the debtor, he might honestly avail himself of the creditor's generosity.

Fraud is never presumed, it must be proved,

The pleadings nor the evidence do not enable, us even to guess at the kind of fraud which the defendant is charged with; it is not urged that the receipt is not a genuine one, that it was given in error, or that any deceit was practised by the defendant,

Every man must feel insecure and alarmed, if, when he has the evidence of his discharge under his creditor's hand, on a mere allegation of fraud, parol testimony may be introduced of part of a conversation of his, in which a fact was advanced, which the previous and subsequent parts of the conversation probably explained, and fraud be hence gratuitously inferred.

It is true the plaintiff had two verdicts, but the first was, while the defendant was incapacitated to defend himself, and his opponent was forbidden to prosecute him; the second was before the allegation of fraud was made, and when this receipt was not produced, the counsel being ignorant of the place where it was.

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The third is that which we are applied to set aside.

It is therefore ordered, adjudged and decred, that the judgment of the district court, be annulled, avoided and reversed, the verdict set aside, and the case remanded, with directions to the judge to proceed thereon as if it had not been submitted to a jury; and it is ordered that the plaintiff and appellee pay costs in this court.

Morse for the plaintiff, *Carleton* for the defendants.

GOULD vs. BRIDGERS.

An attorney cannot become a legal witness in the cause, by striking off his name from the record.

If judgment be claimed for $673 35, it may be given therefor, although the verdict be for 673 75.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The plaintiff claims a sum of $323 85, on a balance acknowledged by the defendant on a settlement of account, due for work and labor done, and $350, which the latter promised to pay the former for Wm. Waugh.

The defendant pleaded the general issue, and payment to the first claim; denied her promise to pay Waugh's debt; that she received

from the plaintiff a note of Burrell & co. a firm of which Waugh was a partner, promising that if Waugh would allow it in payment of what she owed him, she would then pay the plaintiff the amount of the note, $350; that Waugh refused to allow its amount in compensation, and she paid him, and afterwards rendered the note back to the plaintiff, who refused to receive it.

There was a verdict for $673 75, and judgment for $673 35, and the plaintiff and the defendant appealed.

At the trial the settlement of accounts alluded to in the petition was produced, and proved, as well as the instrument by which the defendant promised to pay $350 to the plaintiff for Waugh, as alleged in the petition.

The defendant's counsel offered Harralson, the subscribing witness to prove, that, at the time she signed the last instrument, there was a parol agreement made, between her and the plaintiff, that if Waugh refused to take up Burrell & co's. note, the plaintiff would take it back, and release the defendant of her responsibility for it. The plaintiff's counsel objected to the witness being sworn, and the objection being sanctioned, the defendant's counsel took a bill of exceptions.

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Her counsel in this court insists that the district judge erred.

1. In refusing Harralson's testimony, and

2. In giving judgment for $673 35, on a verdict for $673 75—Lastly that the verdict and judgment are contrary to law and evidence.

I. The court refused correctly parol evidence of what was said, at the time a written agreement was entered into. *Civil Code*, 306, *art.* 224.

II. The claim was for two sums, which together made $673 75, and it was likely through a clerical error that the verdict was entered for forty cents more. The judgment could not be for more than was claimed, and the court was right in reducing it to the sum in the petition.

III. The defendant did claim a new trial on the ground of the verdict being contrary to law or evidence.

The statement of facts shews that two instruments of writing, annexed to the petition, and which were the grounds of evidence of his two claims, were duly proven, as executed by the defendant.

It is therefore ordered, adjudged and de-

creed, that the judgment of the district court be affirmed with costs.

Preston for the plaintiff, *M'Caleb* for the defendant.

DAVENPORT'S HEIRS vs. *FORTIER & AL.*

APPEAL from the court of the first district.

Although the time to bring the action of rescission *a quanti minoris*, be elapsed, the vendee may successfully oppose the vendor's suit.

Although the action of *quanti minoris* does not lie on a judicial sale, on account of a vice or defect in the thing sold, the vendee may avail himself of a want of quantity.

MATHEWS, J. delivered the opinion of the court. This is a suit brought to recover the first instalment of the price of a tract of land, sold at a probate sale and purchased by one of the present parties defendant, for whom the other became surety. The sum of $4033 13 is claimed, and judgment being rendered for that amount in the court below, in favor of the plaintiffs; the defendants appealed.

The case comes up on a bill of exceptions to the opinion of the judge *a quo* by which he rejected testimony offered on the part of the appellants to prove a deficiency of more than one twelfth part of the whole tract of land. And the judge's refusal to allow an amended answer in which the defendants offered to plead, that he had sold and conveyed the property a third person. This last exception was

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abandoned by the appellant's counsel. As to the first we are of opinion that the judge erred. The evidence was rejected on the ground of limitation to actions for diminution of price or cancelling of contracts on the part of Buger; *Civ. Code*, 352, *art.* 46. Although the right of a purchaser to sue in such cases, be barred by the lapse of a year, he does not lose his privilege to except to the payment of the full price (in an action brought by the seller,) on the ground of a deficiency in the quantity of the immoveable sold. This question has already been settled in the case of *Thompson* vs. *Millburne*; see *vol.* 1, 468.

But admitting that the defendants ought to to be allowed the benefit of this exception, it is contended by the counsel for the plaintiffs that the present case is not one to which the provisions of the code, in relation to surplus or deficiency in land sold are applicable. Because he says there is no indication of the extent of the premises at the rate of so much per measure; in other words it is a sale *per avensionem*, and as in such cases, the purchaser would be entitled to any surplus which might exist in the tract, without the payment of additional price; so on the other hand, the vendor ought not to

be compelled to a reduction in the event of deficiency.

We believe that neither of these propositions is true. In the first place, the extent of the front and depth of the land in question were fully indicated by acres and fractions in front, and by ordinary depth. The courses of the side lines were also specified; by all which the superficial quantity could easily be ascertained; and *id certum est quod certum reddi potest.* Should it be admitted that the sale which gives rise to the present action was one *per aversionem;* it does not follow, as a consequence, that the converse of the proposition, which allows a purchaser to retain the whole field, although it exceeds the estimated quantity, without additional price, is true; that is, that the seller is not bound to diminish the price, in proportion to the deficiency of the thing sold. See *Pothier, contrat de vente, chap.* 3, *de la quantité de la chose vendue.*

An other objection is made to the claim of diminution of the price, on the ground of the sale being a judicial sale, in which the action of redhibition is not allowed; and in support of this doctrine, we are referred to the *Civ. Code,* 358 *art.* 74. The action of redhibition, there

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spoken of, relates to the defects and vices of things, not to any deficiency, in quantity; therefore, although it has already been decided, that sales made by order of a court of probates, at the instance, and for the benefit of the heirs of a succession, are of the nature of judicial sales; still, we are of opinion, that the law has not any application to deficiencies of quantity in an immoveable, sold by a court of probates. Although the defendants in their answer claim a rescission of the sale, that ought not to deprive them of the benefit of their exception *quanti minoris*.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and that the cause be remanded to said court, to be tried *de novo*, with instructions to admit all legal evidence, to shew the deficiency alleged in the answer of the land sold, and that the appellees pay costs of this appeal.

TURCAS vs. *ROGERS.*

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TURCAS vs. ROGERS.

The endorsee of a note, after its maturity, must allow any equitable defence to the maker.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is a suit brought by the holder of a promissory note against the maker, which was transferred by endorsement to the plaintiff, after it became due. The defendant in his answer pleads a want of consideration for the promise, and states that the note was given solely to accommodate the payor Seguro, by raising money on it, and that it remained in his hands after a final settlement of all accounts between them, and was improperly transferred. On these pleadings and the evidence adduced in the case, judgment was rendered in the court below in favor of the defendant, from which the plaintiff appealed, and which was reversed in the appellate court, and the case remanded for a new trial, and judgment. On the second trial being pronounced for the defendant, the plaintiff again appeals.

It is true that the evidence of the case, as it was received in the district court, makes out a defence somewhat different from that relied on in the answer, but if properly received, it ought nevertheless to shelter the appellee from the

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payment of money which he did not owe at the commencement of the action. The introduction of the testimony was in no instance opposed as not corresponding with the *allegata*. A bill of exceptions was taken on the first trial of the cause to the admissibility of Seguro the endorser, as a witness; the ground of incompetency is not stated in the bill, and on the former trial of the cause before this court, the plaintiff's counsel abandoned the exception, and claimed the benefit of the testimony given by the witness. On the second trial in the district court, he excepted to certain portions of that testimony, as inadmissible on account of the situation of the witness, being endorser on the note.

The part of the evidence now objected to is that which has a tendency to destroy the effect of the note transferred, in the hands of the present holder, by proving the circumstances under which it was assigned, as accompanied by a collateral security consisting in a note of Samuel C. Young, with John Gravier, endorser, payable to the present appellee, and which Seguro had received from him and delivered to the appellant in the same manner and for the same purpose, for which he had re-

ceived, that is a collateral security for the payment of the note now sued on. The note, being transferred after it became due, is subject to the same equity in the hands of the assignee, that it would have been in those of the assignor. See *Chitty*, 165. And if the latter be competent to prove any thing relative to the validity of the note and circumstances under which it was assigned, he ought to be permitted to tell the whole truth, by giving a fair disclosure of the contract between him and his assignee. If credit be given to Seguro's testimony, the note in question was good and valid in the possession of the present holder, who as well as the transferor might have enforced payment previous to the recovery or receipt of the money secured by the note of Young and Gravier; when that was paid to the holder, who is also possessor of the defendant's own note, a discharge of the latter was immediately effected by compensation; for, having received it to collect for the benefit of the appellee, so soon as he obtained the money on it the appellant became his debtor for that amount.

The testimony of Young, who was called as a witness on the last trial in the court below, strengthens that of Seguro; for he proves the

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payment to the plaintiff of the full amount of the note, which the latter testifies to have been delivered to Turcas, as a collateral security.

According to this reasoning in the cause, it is readily perceived that we have examined it more in relation to the proof adduced than to the allegations of the answer, and this mode of investigation is tolerated by the law of the *Novissima Recopilacion*, so often referred to in judgments rendered by the appellate court.

Whether the note now sued on be considered, as given originally to accommodate the payee, or as evidence of a debt really owing to him from the appellee, the view which we have taken of the case, shews that it has been compensated and paid with the funds of the latter, whilst in the hands of the appellant, and directly to him. The authorities, cited by the counsel for the plaintiff, are therefore not applicable to the present case.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Dumoulin for the plaintiff, *Preston* for the defendant.

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WILLIAMS vs. RABY.

WILLIAMS vs. RABY.

If the defendant deceitfully obtain possession of a slave of the plaintiff, and afterwards has an execution levied on him, and purchases him, the only measure of damages is the hire till the seizure.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The plaintiff complains that the defendant, pretending that he was the owner of a certain negro slave, proposed to, and deceitfully induced him to give him two slaves of the plaintiff's in exchange, the defendant promising to pay a certain sum of money for boot. That accordingly, the plaintiff delivered his two slaves, but the defendant removed his own out of the plaintiff's reach, and afterwards brought suit against the plaintiff, on a note of his, seized the slaves, and bought them for a trifling sum.

The defendant pleaded the general issue, averring that, if any such contract took place, as stated in the petition, it was entered into in good faith and without misrepresentation; that the plaintiff himself withdrew from the contract; but that in fact, there was no legal contract; either party being at liberty to recede, as there was not any writing; that as to the suit mentioned in the petition, the present plaintiff had full opportunity to make there every defence of which it was susceptible; the sheriff was bound to levy the *fi. fa.* on the two slaves, be-

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cause they were especially mortgaged for the debt, and the present plaintiff had no other visible property in the parish.

The plaintiff had a verdict and judgment for $550, the defendant prayed for a new trial, and, it being refused, appealed.

If there be any cause of action, it appears to us it can only be for the hire of the slaves, from the time they came to his hands, till the sheriff's sale.

If this sale be illegal, the defendant's right was unaffected by it, if it be a legal act, it transferred the property, and there cannot be any thing due to the defendant, except the hire of the slaves, till the sale. For this purpose $550 is a very excessive compensation, and there ought to have been a new trial.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, and the verdict set aside and the case be remanded for a new trial, and it is ordered that the appellee pay costs in this court.

Watts and Lobdell for the defendant.

DESPAU & AL. vs. *SWINDLER.*

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DESPAU & AL. vs. SWINDLER.

The courts of this state recognise the signature of the justices appointed by the governor, with consent of the senate.

A justice's certificate will not be rejected because it does not bear date from his parish.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. This is an action on the defendant's promissory note. The answer denies the amicable demand and there is a plea of compensation. The plaintiffs had a verdict and judgment, and the defendant appealed.

1. His counsel urges in this court that the petition should have been dismissed because the plaintiff Despau did not legally answer the defendant's interogatories.

2. His answer ought not to have been read, as it does not appear to have been sworn to, before a magistrate.

3. The plea of compensation was supported, and ought to have been allowed.

1. The record shows that the dissmissal of the petition was moved on the ground, that the answer of one of the plaintiffs was not sworn to before a magistrate, on the refusal of the judge, a bill of exceptions was taken.

It appears that the *jurat* is subscribed by J. Prevosty, who subscribes himself a justice of the peace; but, he does not state of what parish he is a justice, nor does it appear from the

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date of the *jurat*, nor in any part of the paper on which the answer is written, in what parish it was made or sworn to, the parish of Point Coupée, being only referred to; as the place of residence of the respondent.

We are of opinion the district judge did not err. The courts of this state must recognise the capacity of the magistrates of the different parishes, appointed by the governor, with the approbation of the senate. The court of the third district was therefore bound to recognise the signature of Prevosty, a justice of one of the parishes in that district.

His certificate ought not to have been rejected, because in the date of it, he omitted to state the place he was in, when he certified. We must presume, as all judicial acts must be taken to have been properly done, until the contrary appears, that he was in his parish. The circumstance of the deponent being a resident of his parish, adds some weight to the presumption. It being very improbable, that where an inhabitant of a parish makes an affidavit, before one of the justices of his parish both the magistrate and the deponent, should be out of that parish at the time.

II. As we presume the answer was properly

sworn to, we are bound to say, it was correctly allowed to be read.

III. The jury found the plea of compensation against the defendant, and we are unable to say they erred.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Preston for the defendant.

LAFON'S HEIRS vs. *HIS EXECUTORS.*

The court of probates ought not to order the balance in the execution to be paid into court, to be by it applied tothe payment of the debts & legacies.

The executor cannot pay any debt, without the order of the court,especially one against which the plea of prescription lies.

A parol admission of the debt, does not enable workmen and domestics to repel the plea of prescription.

APPEAL from the court of probates of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. In pursuance of the decree of this court, in March, 1823, *vol.* 1, 243, the plaintiffs moved the court of probates to order the defendants to file their accounts as executors of the testator.

They accordingly filed the said accounts, whereby they appeared to remain debtors of the estate for $6,451.

They filed, at the same time, a petition, praying that Jane P. Lafon, one of the heirs, might be directed to return to them certain papers,

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(which they thought necessary to establish the payments they had made) and which they alleged John P. Lafon, her father, had taken from them, praying that, on refusal, they might be permitted to prove these payments by witnesses. On Jane P. Lafon's producing the inventory, made by her father, of these papers, the defendants desired a deposit of them, which was accordingly effected, and the defendants produced another account, in which the balance due by them is reduced to $5930 87, and Jane P. Lafon filed her exceptions to the account produced.

Millaudon, a creditor, and Nayes, a legatee, were admitted to intervene and contest the defendants' accounts, and prayed a provisional distribution of the balance struck out, among such creditors as remained unpaid and the legatees. The court admitted these two intervening parties, and directed the previous distribution of the acknowledged balance, as prayed for.

The court then proceeded to hear the parties on the several items of the executors' accounts, and finally struck a balance against them of $22,709 18.

The judgment declares the defendants strict-

ly debtors of a balance of $29,792 16 but allowed momentarily credit for $7,702, 98, the amount of several debts due to the estate, which they declared they had been unable to collect, but the vouchers of which were not produced, on condition that they should hand over the vouchers or evidences of these claims, whereby the balance found was reduced to the said sum of $22,709, 18.

The defendants are decreed to bring this last sum into court, that the creditors being first paid, the legacies may be discharged, and the balance divided amongst the plaintiffs. The defendants appealed.

The counsel for the appellants complains that,

1. The court erred in directing them to bring the balance due by them, into court, but ought to have left it in their hands, to be by them applied to the payment of the debts of the estate, the discharge of the legacies and the residue paid to the heirs, according to the will of their testator, and that a number of items were struck out from their account, which ought to be reinstated.

The will grants to the defendants one year to liquidate the estate, and more if necessary; and they refer us to our former judgment be-

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tween the parties, in which we held that when the will contains such a clause, heirs claiming under it, cannot demand that the executors should be removed from their trust, till they have entirely liquidated the estate; and it is argued that the plaintiffs, being beneficiary heirs, have no interest in what concerns the creditors and legatees.

The testator died in September, 1820, and the defendants were called on for their accounts in May, 1822, twenty-one months after. The record shews that between the months of December, 1820, and May, 1821, the defendants sold all the property of the estate, except a tract of land at Lafourche, and a lot in New-Orleans, and they have in no manner attempted to account for the delay brought in the disposal of this property.

All the debts due to the estate were recovered, except those, the amount of which was deducted from the balance, and the defendants have not shewn that suit was instituted for the recovery of any of them.

Ample time has been given to the creditors of the estate to produce their claims. All these claims, which according to the accounts exhibited, remain unpaid, do not reach the sum of

$12000, including that of Lefevre, for $10,000, and that of Millaudon, an intervening party. The other debts cannot therefore be either very numerous or consequent, as the defendants have not stated any obstacle to their liquidation or payment.

The defendants allege they have been prevented from liquidating the estate, by being deprived of the papers of the estate, of which John P. Lafon possessed himself, and by the injunction which he obtained to prevent the sale of the property.

The papers have been produced, and none of them are alleged to have been withholden; according to the allegations of the defendants, the receipts which constituted the bulk of them, might be wanted to support the account rendered, but could be no obstacle to the payment of the debts remaining due.

The injunction was not obtained till about eight months after the testator's death, and was dissolved about seven months before the date of the judgment appealed from, so that the defendant had sufficient time to liquidate the estate.

We conclude the defendants had ample time to liquidate the estate, and that the court cor-

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rectly exercised its power to coerce them; but their counsel urges the court of probates had no authority to direct the payment of the balance into court.

Although executors derive their powers immediately under the will of their testator, these powers are to be exercised under the control of the courts of probates, without whose *fiat* they cannot act. The code assimilates them in this respect to curators of vacant estates and beneficiary heirs.

The court of probates has, by an interlocutory decree, directed the defendants to distribute among the creditors of the estate, provisionally the balance they had themselves admitted to be in their hands. This decree, although interlocutory, might have been appealed from, if erroneous, as it directed an absolute disposition of the funds, yet the defendants, so far acquiesced in it, as to refrain from appealing, but they nevertheless, in violation of it, withheld the funds and neglected to empty their hands.

The record shows that the executors, so far misused their powers, as to retain moneys in their hands, which they were decreed to pay to the creditors, that they misapplied a consi-

derable part of the funds, by applying it to the discharge of legacies, before the creditors were satisfied.

Notwithstanding this, we think the court of probates erred in directing the money appearing due by the defendants into court. The sum was a large one, and every thing showed it was not in their hands; the complaint was that a great part of it, had been prematurely paid to legatees.

The order to pay money into court is only to be enforced by the attachment of the person of the party; our jurisprudence requires that this violent measure should not be resorted to, till the party's visible property be exhausted.

If the surviving defendant, Gravier, be imprisoned, the sale of his property will be very much impeded; the plaintiffs may record the judgment, and the lien which may thereby be acquired, will become an insurmountable difficulty to a private sale, and we are ignorant of the right of the court to detain a defendant in jail, because he is unwilling or unable to discharge its judgment, and at the same time send process against his property.

The law has pointed out the manner in which courts of justice, in this state, are to ex-

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ecute their judgments; it does not allow of the seizure of the person of the debtor, till it appear that no property of his is to be found. The order to bring money into court, may perhaps issue against a sheriff or other officer, who actually has a sum in his hands; but, we think it is irregular in ordinary cases.

We are now to examine how far the court of probate was correct in rejecting certain charges made by the defendants.

1. A sum of $1678, charged as paid to Poumeirat, one of the defendants, was disallowed; $850, for wages as overseer of the testator's plantation, from the 1st of April, 1804, to the 1st of September, 1805, and $828, for the hire of three negroes of his, employed on said plantation, from May 1st, 1804, till February 28th, 1806.

2. A sum of $10,482 22 1-2 cents, paid to several legatees.

3. Sundry sums, the payment of which was not proved, amounting together, to $3201 18 cents.

4. Some items rejected for particular reasons, amounting to $6800.

I. The appellees demanded that the item relating to Poumeirat's wages should not be allow-

ed, the claim being prescribed by the lapse of five years from the promulgation of the *Civ. Code*, 488, *art.* 77. So, that, at the the testator's death, ten years had elapsed since the claim was prescribed.

The claim for negro hire, was also opposed as destroyed by prescription, *id.* 488, *art* 78. Such a hire being assimilated to the rent of houses and farms.

The defendants opposed this plea of prescription by a tender of parol proof of the testator's acknowledgment of the claim, in 1819, the year preceding his death. The plaintiffs opposed the introduction of the testimony, on the ground of the code having provided that the prescription shall take place, unless there be a settlement, note given, or an action pending.

The appellants urge that the code speaks only of a settlement taking place, without requiring that it should be written, and therefore the acknowledgment of the testator, which they offered to establish by witnesses, being that of a fixed sum, was equivalent to a settlement.

The judge of probates refused to receive parol proof, and a bill of exceptions was taken.

We think he did not err; the French text of the code, in the part which is translated by the

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expression settlement taking place, uses the words *compte arreté*, equivalent to settled or accepted account, which taken in conjunction with what follows *billets ou action non parimés* note or action not barred or deserted, excludes the idea of an oral acknowledgment.

As executors need the assent of the court of probates to pay any claim, it follows that they cannot, by an unauthorised payment, deprive creditors, legatees, or heirs of the protection which the plea of prescription gives against unliquidated claims.

As in the present case the debtor was an executor, the objection of the heirs acquires from this circumstance increased force.

We think the court of probates, if applied to for leave to pay the claim, ought to have withholden its assent, at least till all holders of unprescribed claims were satisfied.

II. While there were unsatisfied creditors the executors paid legacies in their own wrong, and the court acted correctly in striking out every item of payment to legatees.

III. The items rejected for lack of proof are six in number.

1. One of $1,340 50, "for sundry payments to several persons, whose names are not pre-

sent to our memories." The executors attribute their lack of reminiscence to the possession taken by John P. Lafon of some of their papers. If it support this charge, it might have supported any to the amount of the whole estate.

2. $300, to the defendant, Poumeirat, in reimbursement of a draft of his on the testator, who died before it reached New-Orleans. The draft was produced, with the receipt of Minaudon, the holder, for its amount. But nothing shews that any claim of Poumeirat on Lafon's authorised this draft, nor that the latter had directed it to be drawn.

3. An item for $533 68, paid to Boisdore for collection. This man is stated to be dead, and this is supposed to account for the absence of his receipt.

4. $568, stated as paid to Marson, now also dead, "for two accounts against the estate." None were produced.

5. A charge of $399 50, to A. Boisdore, deceased, a free man of color, for salaries due him by the deceased. The nature of the services for which the salaries were rendered is not stated; no voucher, no proof of payment.

6. $4 50, for taxes, a receipt for $30 was

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produced, $54 50 were therefore correctly struck from this item.

IV. Four articles were rejected for particular reasons.

1. The first is an item of $4000, which the defendant Gravier seeks to retain for the payment of two notes of Livingston of $2000 each, payable to his testator, which he received from the latter, who at the maturity of them directed him not to protest them and promised to pay them.

Gravier applied to these objects the first funds of the estate that came into his hands, but neither he nor his co-executor took any step to procure payment from Livingston, till about four years after the testator's death, when the time of their executorship had expired, and as the debtor, by his departure for congress, as a representative of this state, was protected from arrest; the court of probates decided the executors, by their unaccountable and protracted neglect, made the notes their own and struck out the item.

J. P. Lafon, a brother of the testator, purchased, at the auction of the estate, several lots of ground for $950, at one and two years' credit. The executors utterly neglected to de-

mand his notes, according to the terms of the sale, or to take any step to coerce a payment or obtain the rescission of the sale. They have made a charge for this loss; but the judge of probates correctly concluded that, as it occurred through their neglect, it should fall on them.

3. Poumeirat, one of the executors, charges $100 for the expenses of his passage to New-Orleans from Philadelphia, in order, as he says, to come and take on himself his part of the execution of the will.

The statute details the charges which the executor may make for costs incurred. *Civil Code*, 248, *art.* 178.

Poumeirat, besides his commission, as an executor, had a legacy, and he found his interest in coming over to entitle himself to it, by his attention to the execution of the will.

We think this item was also properly stricken out.

4. Lastly, an item of $1750 was struck out, composed of sundry sums of money, advanced to John P. Lafon, an heir of the testator, for his passage, house rent and the payment of some of his debts. The judge of probates was correct in saying that this sum should not

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be allowed, till the creditors and legatees were paid, and provisionally rejected it.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates, so far as it ascertains the balance in the defendants' hands, be affirmed; but that the part of it, which orders that balance to be paid into court, be annulled, avoided and reversed, and it is ordered, adjudged and decreed, that the case be remanded with directions to the judge to ascertain the sum due to the intervening creditor or creditors, give judgment accordingly in their favor; and for the balance in the hands of the defendants, in favor of the heirs; with directions that the sheriff may bring the money made into court, to satisfy these parties, unless any creditor oppose the payment of the intervening creditor, or any creditor or legatee the payment of the heirs; and it is ordered the appellees pay costs in this court.

Moreau for the plaintiffs, *Young* for the defendants.

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HEIR.

1 A beneficiary heir, responsible in his private capacity, is liable in the district court. *Martin's heirs* vs. *Martin*, -

2 May sue the widow in the district court, for a division of the property of the community. *Gague's heirs* vs. *Gague & al*, - - - - - - - 172

3 Absolute one, of full age is suable, in the district court. *Ingrem* vs. *Ingrem*, - - - - - - 269

4 If he buy litigious property, cannot claim the increased value in case of eviction. *Gravier's heirs* vs. *Gravier*, - 206

HUSBAND & WIFE.

1 He can sue her heirs, in the district court, to establish contradictorily with them the amount of the community debts. *Broussard* vs. *Bernard & al.*, - - - - - 37

2 A woman, deceived, by a man, who pretends to be single, and has children born during the deception, are entitled to the rights of a legitimate wife and children. *Clendenning* vs. *Clendenning & al.*, - - - 438

See INSOLVENT, 1—PRACTICE, 38.

INJUNCTION.

1 It will not be dissolved, though improvidently issued, if it appear, that posterior circumstances will demand that it issue a new. *Exicios* vs. *Wynn*, - - - 480

INSOLVENT.

1 The wife for her paraphernal estate, disposed by the insolvent is a privileged creditor. *Dreux* vs. *Dreux's syndics*, 239

2 Proceedings in an insolvency are *res inter alios acta*, as to a creditor not on the bilan, and whose claim is not noticed there. *Bainbridge* vs. *Clay*, - - - 262

3 Proceedings in another court, than that seized of the *concurso*, by a party to it, are illegal and void. *Menard* vs *Pierce & al., Same case*, - - - - - *id.*

4 The legal means of shewing the insolvency of an estate is by a settlement of the estate, in the court of probates.—*Semple* vs. *Fletcher*, - - - - 382

5 Three fourths of the creditors on the bilan, are necessary, in the case of a forced respite. *Dauphin & al.* vs. *Soulie*, 446
6 In a suit against syndics to be placed on the tableau, an amicable demand is unnecessary. *Marigny* vs. *Johnson's syndics*, - - - - - - - 551
7 A judgment reversing one, by which a syndic was appointed, vitiates not what he did in the meanwhile. *Saulet* vs. *Dreux's syndics*, - - - - - - 615
8 The law has fixed no period, during which, the sale of an insolvent's property is to be advertised. *Same case*, - *id.*
9 Insolvency cannot be better tested than by a return of *nulla bona*. *Taylor* vs. *Curtis*, - - - - - 139
10 Three fourths of the creditors are necessary on a respite, to bind the absent ones. *Young* vs. *Gilly*, - - - 504

INTEREST.

1 Conventional, promised on the price during three years, does not run, in case of further indulgence. *Hepp & al.* vs. *Ducross & al.*, - - - - - - 185
2 Is due on the price of a slave, from the time it became payable. *Same case*, - - - - - - *id*

See USURY, 2.

INTERROGATORY.

1 Cannot be answered by an agent. *Buford* vs. *Valentine* - 57
2 Answer to, cannot be divided. *Hunter* vs. *Smith*, - - - 109
3 If it be evasive, the case will be remanded. *Byrd* vs. *Bowie*, 212
4 If a part of the plaintiff's answer be stricken out, the defendant cannot have further time to except to the suit. *Clay* vs. *Oldham*, - - - - - - - 266

See PROMISSORY NOTE, 3—PRACTICE, 19 & 20.

JOINT OWNERSHIP.

See PARTITION, 2 & 3.

JURY.

1 The question of fraud is of the province of the jury. *Ham* vs. *Herrman*, - - - - - - - 1

2 The *venire* is not vitiated, by the impossibility of summoning a number of the jurors drawn. *Cox* vs. *Wells & al.* - 158

3 Talesmen may be summoned, without first exhausting the legal means of compelling the attendance of all the jurors on the pannel. *Chalmers & al.* vs. *Stow*, - - 307

4 An intervening party may claim a jury. *Lacroix* vs. *Menard & al.*, - - - - - - - 339

5 An application for a jury is too late, when judgment is about to be pronounced for want of an answer. *Butler* vs. *Kenner & al.*, - - - - - 388

6 If in deciding on conflicting evidence, a jury compromise between the parties, a new trial will be ordered. *Bowman* vs. *Flower*, - - - - - - 641

7 When the evidence is equal, the jury ought to find against the party who supports the affirmative of the question. *Same case*, - - - - - *id.*

8 Either party discovering at the trial that a juror served on the first trial, may demand his removal. *Henry* vs. *Cuvillier*, - - - - - - 524

LAND

1 A squatter on public land, has no right to object to the passage of a road over the land he occupies. *Allard & al.* vs. *Lebau*, - - - - - 293

2 Possession cannot be pleaded against the public, except for time immemorial. *Same case*, - - - *id.*

LAW.

1 Where the law of the place of the contract is not set forth, the court will take for the rule of its decision, the law of the state. *Campbell* vs. *Miller*, - - - 142

2 Same point. *Campbell* vs. *Henderson*, - - - 152

LOUISIANA STATE BANK.

A party sued by it cannot plead that its directors have not taken the oath prescribed by law. *Louisiana State Bank* vs. *Flood*, - - - - - - 341

MARITAL PORTION.

A widow is entitled to the, although she married, and resided, and her husband died in another state. *Abercrombie* vs. *Caffray & al.* - - - - - - 1

MARRIAGE CONTRACT.

Under the Spanish laws, valuation, in a marriage contract, vested not the property in the husband. *Prudhomme* vs. *Dawson & al.* - - - - - 161

MERCHANT.

1 If a commission merchant transmit an account current, shewing a balance due from him, which he afterwards pay, he cannot recover it back, on the ground that he sold his correspondent's cotton for a bill, which is since returned protested. *Fisk & al.* vs. *Offit & al.* - - - 553

2 Especially, if the latter, in the meanwhile, remitted the proceeds to the person for whose account he had consigned the cotton to the plaintiff. *Same case*, - - *id.*

3 Ten per cent is an excessive commission for the sale of goods. *Arnold* vs. *Dean*, - - - - - 248

MINOR.

An emancipated one, can only bind himself by a contract that turns to his advantage. *Guirot* vs. *Guirot's heirs*. - 400

See EXCHANGE, 2.

MORTGAGE.

1 On the failure of the mortgagor, no judgment is necessary, to pursue the premises in the hands of a third possessor. *Miller & al.* vs. *Mercier & al.*, - - - - 229

2 Same point. *Rowell* vs. *Buhler & al.*, - - - 248

3 The recorder is not bound to cancel a, on the production of the note, to secure payment of which it was given. *Lemos* vs. *Duralde*, - - - - - 253

4 The endorser of a note secured by a mortgage, may after payment, have an order of seizure and sale. *Nichol* vs. *De Ende*, - - - - - - - 310
5 But, must prove his right by authentic evidence. *Same case*, *id.*
6 A third possessor must be pursued by an action of mortgage. *Richards & al.* vs. *Nolan & al.*, - - - - 336
7 A vendee ought to be permitted to shew the premises were mortgaged, and suit brought on the mortgage. *Bushnell* vs. *Brown's heirs*, - - - - - - 449
8 Property, especially mortgaged, cannot be sold at the suit of a third party, for less than the amount of the mortgage. *De Armas* vs. *Morgan*, - - - - - 604
9 An order of seizure, though obtained before a debtor's death, cannot be executed afterwards. *Jenkins* vs. *Tyler*, - 182
10 But the creditor is entitled to costs. *Same case*, - - *id.*
11 An application for an order of seizure and sale is to be made to the judge of the debtor's domicil. *Marigny* vs. *Hunt*, 651
12 The plaintiff cannot proceed by it and the *via ordinaria*. *Same case*, - - - - - - - - *id.*
13 If he do the *via executiva* will merge in the *ordinaria*. *Same case*, - - - - - - - *id.*

NAVIGATION.

1 The necessary expences of a vessel coming into the Bayou St. John, are not confined to the toll. *Hyde & al.* vs. *Henry*, 179
2 But extend to all necessary disbursements, till her return. *Same case*, - - - - - - - *id.*
3 If the master of a steam-boat, leave behind part of the freight, he may be held to pay its value. *Frisby* vs. *Sheridan*, 242
4 Although he offer to bring it down at his next trip. *Same case*, *id.*

NOVATION.

Is not presumed. *Crain* vs. *Roberts*, - - - - 145

NUISANCE.

A suit for its removal lies in the district court, although the cor-

poration have power to abate it. *Trustees of Natchitoches* vs. *Coe*, - - - - - - 140

See PRACTICE, 24.

NULLITY.

The absence of the reasons on which a judgment is rendered is only a relative nullity. *Whitehurst* vs. *Hickey & al.* 589

See DISTRICT COURT.

OVERSEER.

Discharged for misconduct can recover only for the time he served. *Grafton* vs. *Collins*, - - - - - 150

PARISH JUDGE.

His attestation is legal, though he subscribes himself judge, and not parish judge. *Exnicios* vs. *Weyss*, - - - 480

See SALE, 18, SHERIFF, 11.

PARTITION.

1 Transaction may include partition, as partition includes alienation and sale. *Goodwin* vs. *Chemeau's heirs*, - 409

2 The same rules, which govern partition do not strictly apply to every act, by which the joint ownership is destroyed. *Same case*, - - - - - id.

3 It is a fiction of law that all acts putting an end to joint ownership, are to be considered as partitions. *Same case*, - id.

4 A contract by which a stepfather, renounces all his right to his wife's estate, on receiving specific property, is not a partition. *Same case*, - - - - - id.

See PRESCRIPTION, 1.

PARTNERSHIP.

The firm may consist of the name of one partner only. *Phillips* vs. *Paxton & al.*, - - - - - - 3

See PROMISSORY NOTE, 4.

PENALTY.

It cannot exceed double the amount of the injury. *English* vs. *Latham*, - - - - - - - 88

POSSESSION.

See LAND, 2.

POWER.

Vested by the words "it shall be lawful" need not necessarily be exercised. *Caulker* vs. *Banks*, - - - - 532

PRACTICE.

1 A judgment is valid, although the sum adjudged be not stated therein, when it appear on the record. *Melancon's heirs* vs. *Duhamel*, - - - - - - - 7

2 When the plaintiff fails in making out his case, there is judgment of non-suit. *Hervey & al.* vs. *Russel*, - - - 59

3 Where an instrument is not the gist of the action, a small variance is immaterial. *Baldwin* vs. *Hazelton*,, - 61

4 A plea of *res judicata* is sustained, if it appear that the same thing was disallowed in a former suit. *Voorhies* vs. *Mulhollan*, - - - - - - 70

5 Inconsistent pleas cannot be received. *Ferguson & al.* vs. *Thompson & al.* - - - - - - 75

6 Motions for a new trial are always addressed to the discretion of the court. *Roberts* vs. *Rodes*, - - - - 100

7 It will be denied to a party who did not use due diligence. *Stafford* vs. *Callihan*, - - - - - 124

8 A freeholder, who signed a return for a road, will not be permitted to prove he was not sworn. *Innis* vs. *Kemper*, 119

9 It is not essential that a judgment should refer to some law. *Henderson* vs. *Bowles*, - - - - - 152

10 The sheriff's return, that he served the petition and citation, is evidence he did so in both languages. *Cox* vs. *Wells & al.* - - - - - - - - 158

11 The goods sold need not be described in the petition when the defendant has assumed payment of their amount. *Collins & al.* vs. *M'Crummen & al.* - - - 166

12 The court, not the party, must judge, whether due diligence was used in procuring testimony. *Loccard* vs. *Bullit*, 170

13 A defendant is not regularly in court by service on an attorney appointed by the judge to defend him. *Holliday* vs. M'*Culloch & al.* - - - - 170

14 If the sheriff, in copying a citation, insert words not in the original, this will not vitiate it. *Herman* vs. *Sprigg*, 190

15 A denial that the plaintiff performed part of his contract, is no admission that he performed the rest, if the general issue be pleaded. *Cornell & wife* vs. *Hope Ins. Co.* 223

16 The neglect of the party to prove what is essential to his recovery, is not cured by the evidence of the other leaving it doubtful. *Same case*, - - - - - *id.*

17 Service of the copy of the judgment on the bail is not legal. *Frisby* vs. *Sheridan*, - - - - - 242

18 The pleas of usury, fraud, and want of consideration, do not wave the general issue. *Durnford* vs. *Aime*, - - 270

19 If a party be called by interrogatories, to say whether he has a certain paper, answer in the affirmative, it is sufficient for him to produce it at the trial. *Clay* vs. *Oldham* - 279

20 And his opponent is not entitled to a continuance to examine it. *Same case*, - - - - - *id.*

21 If the proceedings have been changed from the *via executiva*, to the *via ordinaria*, judgment may be given generally against the defendant. *Same case*, - - - - *id.*

22 The plaintiff may shew the value of goods sold, although he did not declare on a *quantum valebant*. *Boyd & al.* vs. *Howard*, - - - - - - - 286

23 Every affidavit for a continuance should contain a declaration that the evidence is material, that due diligence has been exercised, that there is a probable expectation of obtaining it, and that the continuance is not asked for improper delay. *Allard & al.* vs. *Lobau*, - - - 293

24 A judgment against a person who sues for the abatement of a nuisance does not form a *res judicata* against another plaintiff. *Same case*, - - - - - *id.*

25 In the first district leave to amend ought to be asked, before the day the causes are set down for trial. *Chalmers & al.* vs. *Stone*, - - - - - - 307

26 The sheriff may, at any time, perfect his return by signing it. *Nichol* vs. *De Ende*, - - - - 310

27 The plaintiff may shew, at the trial, that what is claimed by way of reconvention is pending in another suit. *Pierce* vs. *Miller*, - - - - - - - 354

28 An averment that the obligation has been discharged dispenses with the proof of its execution. *Nalle* vs. *Carlin*, - 373

29 The power of courts to enjoin their own writs, depends not on the nature of the property levied on. *Menard* vs. *Pierce & al.* - - - - - - - 375

30 An *alias fi. fa.* cannot issue, till the return of the first. *Mackey* vs. *Trustees of the Presbyterian Church*, - - 390

31 An inferior court may set aside an order improperly granted. *Shaw & al.* vs. *Thompson*, - - - 392

32 A judgment of eviction cannot be pleaded as *res judicata* against a claim against the vendor for damages. *Goodwin* vs. *Chemeau's heirs*, - - - - 409

33 The plaintiff cannot at once proceed by the *via executiva* and the *ordinaria*, *Gurley & al.* vs. *Coquet*, - - - 498

34 When the rules of court require no replication, all means of defence are left open to the plaintiff. *Flood & al.* vs. *Shamburgh*, - - - - - - - 622

35 The *allegata* and *probata* must agree. *While & al.* vs. *Roland*, - - - - - - - 636

36 A failure in the plaintiff to comply with a condition precedent, may be taken advantage of, under the general issue. *Abert* vs. *Bayon*, - - - - - 644

37 Service at the last place of residence is bad. *Ireland* vs. *Bryan & al.* - - - - - - 515

38 A wife cannot appear without her husband. *Same case*, - *id.*

39 A defendandt cannot amend his answer without leave. *Robinson & al.* vs. *Williams*, - - - - - 665

40 Compensation must be specially pleaded. *Same case*, - *id.*

41 The plaintiff need not file any replication. *Skilliman* vs. *Jones*, ... 689
42 The return of a citation cannot be explained by parol. *Same case*, ... id.
43 Not even by the sheriff or his deputy. *Same case*, . . id.
44 The remedy in such a case is to call on the officer to amend. *Same case*, ... id.
45 If there be a replication, it may be read to the jury, to place before them a charge that might be made *ore tenus*. *Same case*, ... id.
46 The defendant cannot be admitted to demur to the evidence, unless he admit every fact which the jury might infer from it. *Same case*, ... id.
47 The courts recognise the signatures of judicial officers, appointed by the governor with the advice and consent of the senate. *Despau & al.* vs. *Swindler*, . . 705
48 A justice's certificate will not be rejected, because it does not bear date from his parish. *Same case*, . . id.

PRESCRIPTION.

1 Purchasers under the same title, without partition, cannot prescribe against each other. *Broussard* vs. *Duhamel*, 11
2 Does not run against the wife, although separated. *Prudhomme* vs. *Dawson & al.* - - - - 161
3 The action *quanti minoris*, is prescribed by one year. *Mil-* vs. *Soubercase*, - - - - - 287
4 Services rendered on board of the defendant's steam boat, cannot be connected with others on board of another, in which he was interested, in order to rebut the plea of prescription. *Chadwick* vs. *Waters*, - - 432
5 A sale not subscribed by the vendor, cannot be the basis of the prescription of ten years. *Bonne & al.* vs. *Powers*, 458
6 Damages for an injury are not recoverable by reconvention after one year. *Ritchie* vs. *Wilson*, - - 585
7 A parol admission of a claim does not enable a workman to repel the plea of prescription. *Lafon's heirs* vs. *his executors*, - - - - -

See EXECUTOR.

PRIVILEGE.

See LAND—SALE.

PROMISSORY NOTE.

1 The act which requires the sum to be in words at full length, does not affect notes theretofore made. *White & al.* vs. *Brown & al.* 17

2 If the endorser reside at the distance of six miles, three or four days are too great a delay, in giving notice. *Reynolds* vs. *Buford*, ... 35

3 The indorsee cannot require that the maker be made a party and answer interrogatories. *Compton & al.* vs. *Patterson*, ... 164

4 A note endorsed by a partner, does not render the endorsee liable to the firm for laches. *Collins & al.* vs. *M'Crummen & al.* 166

5 If the note be regularly endorsed, the plaintiff cannot be put on the proof of his right thereto. *Banks* vs. *Eastin*, 291

6 Unless it be alleged he did not come fairly by it. *Same case*, *id.*

7 A blank endorsement renders the note payable to bearer. *Same case*, ... *id.*

8 If the note alleged to be lost, be admitted to have been executed, and is proven to have been protested and returned to the plaintiff, he will not be compelled to give security. *Brent* vs. *Erwin*, ... 303

9 Parol evidence may be received of the endorsee's promise, after the protest, to pay. *Debuys* vs. *Mollere*, . . 319

10 A bank cannot contest the right of a person, who lodges a note for collection. *Canonge* vs. *Louis. State Bank*, 344

11 And is suable for neglect in protesting and giving notice, before the plaintiff proceed against his endorsers. *Same case*, ... *id.*

12 The defendant cannot call in question the plaintiff's right to a note to which he has *prima facie* title. *Shaw & al.* vs. *Thompson*, ... 392

13 When a note is made payable at a particular place, payment must be demanded there, before a recourse can be had against the maker. *Miller* vs. *Croghan*, . . 423

14 If a note be payable at the house of A. B., a demand at his dwelling house or office, is good. *Miller* vs. *Hennen*, 587

15 An agreement, by the endorsee, after protest and notice, to receive pickets, on a deferred day, discharges the endorsee. *Millaudon* vs. *Arnous & al.*, . . . 596

16 A bank is not relieved from the obligation of due diligence, with regard to a note, received in collection, by the removal of the maker's domicil out of the city. *Louis. State Ins. Co.* vs. *Louis. State Bank*, . . . 610

17 What is full value, for a note is a question of law. *Flood & al.* vs. *Shaumburg*, ... 622

18 The endorser of a note after maturity, must allow every equitable defence to the maker. *Turcas* vs. *Rogers*, . 699

See SURETY.

REFEREES.

1 Whether a case may be sent before them, when a jury was prayed for. *Quere*. *Caulker* vs. *Banks*, . . 532

2 A judge may refuse to send a cause before them, although there be long and intricate accounts. *Same case*, . *id.*

REGISTRY.

When a lien results not from a contract, but from an act done, the want of a registry cannot be objected. *Miller & al.* vs. *Mercier & al.*, ... 229

ROAD.

1 The right of the navigation company to make a road, on the bank of the Bayou St. John, is not a surrender of the sovereignty of the public. *Allard & al.* vs. *Lobau*, . 293

2 The right of the state to make roads is not limited to the banks of navigable rivers. *Same case*, . . . *id.*

See PRACTICE, 3.

SALE.

1 The acts of the vendor, after the sale, are against the vendee evidence of fraud, in the former. *Martin* vs. *Reeves & al.* 22

2 So his declarations, as part *rei gestarum*. *Same case*, - *id.*

3 A purchaser, at a probate sale, is not entitled to the action of redhibition. *Pintard & al.* vs. *Degris*, - - 32

4 A purchaser of land, at a probate sale, has no recourse against the estate, for the value of improvements put up, by a third party, if the land was sold, as it belonged to the estate. *Rutherford's representatives* vs. *Martin's heirs*, 63

5 A sale, without delivery, does not prevail against a second, accompanied by it. *Smoot & al.* vs. *Baldwin*, - 84

6 The vendor cited in warranty, who admits he transferred and delivered, but has a just title, does not admit the plaintiff's. *Calvit* vs. *Compton & al.*, - - - 86

7 In the action of redhibition, the thing sold is given back, and the price claimed. *Robert* vs. *Rodes*, - - 100

8 The acknowledgements of the vendor in the bill of sale, are evidence against a subsequent vendee. *Martin* vs. *Curtis & al.* - - - - - - 105

9 In a public sale to satisfy a mortgage, the mortgagee, if he purchase, will be allowed to retain the price. *Bacon* vs. *M'Nutt & al.*, - - - - - 129

10 The purchaser it not necessarily in bad faith from the commencement of the suit. *Prudhomme* vs. *Dawson & al.*, 161

11 No action of redhibition lies on a judicial sale. *Abal* vs. *Casteres*, - - - - - - 220

12 The purchaser cannot withhold the price, on the ground, he bought no title. *Same case*, - - - *id.*

13 The remedy of the Spanish law against him, by imprisonment is not unconstitutional. *Same case*, - - *id.*

14 If the vendor promise, after the sale, to send the thing on board of a vessel, and through the neglect of his clerk, it be lost on the way, the vendee may withhold the price. *Lincoln & al.* vs. *Visoso*, - - - - 325

15 A receipt acknowledging the payment of the price is evidence of a sale. *Richard* vs. *Noland & al.* - - 336

16 If both parties after the sale remain in the house, the possession follows the title. *Same case*, ... *id.*

17 A purchaser, who bought, without the legal formalities, when sued by the vendee, cannot claim security against his title. *Ingrem & al.* vs. *Ingrem*, . . . 389

18 A parish judge, as such, cannot certify a vendor's acknowledgement. *Seymour* vs. *Cooley*. . . . 396

19 The vendee of a judgment debt may resist payment, if the suit had not ripened into a judgment at the time of the sale. *Henderson* vs. *Griffin*, - - - - 483

20 The first vendor may be sued on his warranty, by his immediate vendee, on the latter's vendee being evicted. *Goodwin* vs. *Chemeau's heirs*, - - - - 409

21 Unless the immediate vendee sold without a warranty, *Same case*, - - - - - - - - *id.*

22 The vendee is not disturbed by the recovery of an adverse claimant, in a suit to which he is not a party. *Exnicias* vs. *Weiss*, - - - - - - - 480

23 If he who advances the price, take the bill of sale in his own name, he cannot be disturbed, till he be reimbursed. *Villars* vs. *Morgan*, - - - - - 529

24 The words *I do sell*, in an instrument, amount to a sale, *Crocker* vs. *Neeley & al.* - - - - 583

25 The consent of the vendee may be given after the sale and proved *aliunde*. *Same case*, - - - - *id.*

26 Although the time to bring the action of rescision or *quanti minoris*, be elapsed, the vendee may successfully oppose the vendor's suit. *Davenport's heirs* vs. *Fortier & al.* - 695

27 Although the action of *quanti minoris* does not lie on a judicial sale, on account of a vice or defect in the thing sold, the vendee may avail himself of a want of quantity. *Same case*, - - - - - - - - *id.*

See SHERIFF, 3, 4.

SHERIFF.

1 May amend his return, after a contest, in which its validity is attacked. *Aubert* vs. *Buhler & al.* - -

2 And return an execution after the return day. *Same case.* - *id.*
3 If he levy, before the return day, he may sell after. *Same case,* - - - - - - - *id.*
4 A purchaser at a sheriff's sale, cannot be affected by a posterior irregularity. *Same case,* - - - *id.*
5 It is not a defence against his claim for fees, that he did not reside in the state, when the services were rendered. *Morgan* vs. *Mitchell,* - - - - - - 576
6 When he is charged with a culpable breach of duty, the proof lies on the party, although it involve a negative. *Same case,* - - - - - - *id.*
7 If slaves be committed to him as felons and runaways, he cannot release them, on their being discharged of the felony. *Same case,* - - - - - - - *id.*
8 It is not a good defence against his claim for keeping them, that they were not in close custody. *Same case,* - *id.*
9 If he fail to advertise a runaway slave, he cannot recover the legal fees. *Same case,* - - - - - *id.*
10 But he may the value of his services, if their detention was known to the owner, and he refused to take them. *Same case,* - - - - - - - *id.*
11 The parish judge's certificate that a sheriff's bond has been executed, with the consent of the justices, is evidence that they approved the sureties. *Whitehurst* vs. *Hickey & al.* - - - - - - - 589
12 And they are bound by it, though it be not recorded. *Same case,* - - - - - - - *id.*

SLAVE.

1 In a suit for killing a slave, presumptive evidence supports the verdict. *Crawford* vs. *Cheney,* - - - 142
2 If the defendant's plea, be not supported by evidence, and he appeal, damages will be given. *Same case,* - - *id*

See SHERIFF, 7, 10.

SURETY.

That on a note cannot claim the benefit of the law relating to endorsees. *Guidrey* vs. *Vives*, - - - 659

USURY.

1 If more than lawful interest be stipulated for, the principal alone can be recovered. *Herman* vs. *Sprigg*, - 100
2 And the borrower is not bound to pay any interest. *Same case*, id.
3 Usury may be committed by taking lawful interest on more than is lent. *Flood & al.* vs. *Shaumburg*. - - 622

WIDOW.

1 When she accepts the community, she is liable in the district court. *Flood & al.* vs. *Shaumburg*, - - - 622
2 When she has taken an active part, or made no inventory, she cannot renounce. *Same case*, - - - id.

WILL.

1 When it appears from it, it was read to the testator in presence of the witnesses, it matters not what expressions were used to convey the information. *Forstal & al.* vs. *Forstal*, - - - - - - 367
2 The Spanish law did not require, that all the formalities required by law, should appear on the face of the will.—*Bonne & al.* vs. *Powers*, - - - - 459
3 The validity of a will, not presented to the parish judge, cannot be inquirhd into the district court. *Bradford's ex'r* vs. *Beauchamp*, - - - - - 473
4 Till it be presented, it cannot enable to present. *Same case*, id.

WITNESS.

1 When he has no interest in the event of the suit, but some on the question, the objection goes only to his credibility. *Broussard* vs. *Duhamel*, - - - - 11
2 One, who is liable to costs, but has the means of securing himself, is a competent witness. *Cole & al.* vs. *M'Crummen & al.* - - - - - - 671

THE END.